

QUAKERISM, LOCALISM AND LAW

- a critical consideration of the
history of Quakers in the North
West of England and the religious
and political policy of the
Restoration.

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Doctor of Philosophy.

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DECLARATION OF ORIGINAL AUTHORSHIP

I confirm that this is my own work and the use of all material from other sources has been properly and fully acknowledged.

I have had the assistance of Ms Kate McIntosh, MA with proof editing. I confirm that she has not altered the substance of the thesis and that the work is entirely my own.

SALLY JANE GOLD.

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Branch's Case (KB 1585) Moo 219 (cited in Helmholz *ibid*).

Bushell's Case (1670) Vaughan 135; 124 ER 1006.

Cawdry's Case (1591) 77 ER 1.

Goulson v Wainwright (1668) 1 Sid 374; 82 ER 1165.

Herne v Brown (1679) 1 Ventris 339; 86 ER 219.

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Langhorne and Lambert v Hutchinson TRANS.CP 1674/6 (Borthwick Institute for Archives).

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ABSTRACT

This thesis constitutes an empirical local study of Quakers' experience under the law between 1660 and 1685 when the monarchy and the Church of England were restored. Members of the Religious Society of Friends, who became known as Quakers, were newly prominent Protestant opponents to, and separatists from, the Church of England.

The thesis considers the substantive and procedural aspects of the law that gave rise to the sufferings which Quakers recorded during this period. It critically examines those records. Focusing upon the North West of England, it draws together under-researched local and national sources that illustrate the operation of both ecclesiastical and secular legal processes as they had evolved by the mid-seventeenth century. This thesis examines, in particular, the historical law concerning tithes, oaths, ecclesiastical offences and religious meetings with which Quakers' conscientious beliefs brought them into conflict. It also examines the way in which state and ecclesiastical power, through its legal processes, responded to the challenges that Quakers brought in the context of the wider relationship between religious dissent and the state in this pivotal period.

INTRODUCTION

1. General Introduction

This thesis examines the law and the legal processes that were employed against Quakers during the Restoration of the monarchy under Charles II from 1660 to 1685, with particular reference to the North West of England.¹

In his introduction to *A Collection of the Sufferings Of the People called Quakers* Joseph Besse summarised: *The principle points wherein their conscientious non-conformity rendered them obnoxious to the Penalties of the Law:*

- *their refusal to pay tithes*
- *their refusal to pay rates or assessments for building and repairing Houses or Places appropriated to the Exercise of such a Worship as they did not approve of*
- *their Constant Obedience to the Precept of Christ Swear not at all*
- *Their Christian Resolution of assembling publickly* for the Worship of God in such a manner as was most agreeable to their Consciences*
- *The Necessity many of them found themselves under of publishing the Doctrine of Truth which they were persuaded of, and of reproofing vice and immorality openly in the Streets and Market, and sometimes even in the Places appointed for the public National Worship*
- *Their refusing to make Use of the established Priests or Ministers, either in Marrying, Burying, or any other Case, and conscientiously withholding the fees customarily paid on those occasions.*²

¹ The reason for this local study is explained in Chapter One, Research Strategy and Methodology.

² Joseph Besse, *A Collection of the Sufferings of the People Called Quakers* (First published London 1753. Facsimile, Sessions Book Trust 2000) v-vi. The list of points that are cited omits legal proceedings that are not the subject of this thesis. Between 1998 and 2008, the Sessions Book Trust published a series of regional facsimiles of the original 1753 edition (which is now out of print). I have used the Sessions Trust facsimiles for Westmoreland 1651-1690, Cumberland 1653-1690, Durham and Northumberland 1658-1690, Isle of Man 1656-1685, Lancashire 1652-1690) 2000 and West Midlands 2008 (for Cheshire). Hereinafter, my references to Besse throughout the thesis are to the 2000 (for Westmoreland, Cumberland and Lancashire) and 2008 (for

The Quakers were both critics and victims of the law and they offer a unique perspective on the law and its operation against religious dissenters. The thesis comprises an empirical study of their encounters with the law during the Restoration period and it contributes to the fields of legal history and Quaker history. It draws together under-researched areas of secular and ecclesiastical law and examines aspects of the practice and intersection of both in the mid-seventeenth century.

A core argument is that the substantive law, and its associated procedures, should be at the fore of any consideration of Quakers' experience. Law was pivotal in the struggle between religious dissenters and the state during the Restoration. Nenner,³ who emphasises the centrality of the law in relation to the constitution and politics of the Restoration,⁴ observes that seventeenth-century educated men were steeped in the law and interpreted political issues in legal terms. I examine how this manifested itself in practice in relation to Quakers who pushed the law to its limits. This leads to an interrogation of the integrity of the relevant aspects of ecclesiastical and secular legal systems in operation at this time.

A key question is whether it is possible to distinguish between laws that were, in themselves, motivated by malevolence or prejudice, and those which were applied to Quakers as they would have been to any transgressor. In order to look objectively at the character of English persecution under the law, we should distinguish between those jurisdictions that, effectively, made being a Quaker an offence – such as certain American colonies,⁵ and, closer to home, the Isle of Man, both of which banished them – and the mainland English system. Nonetheless, there are many complaints of severe treatment and excessive penalties under

Cheshire) editions respectively. *I have retained the original spelling from primary sources throughout the thesis.

³ Howard Nenner, *By Colour of Law, Legal Culture and Constitutional Politics in England, 1660-1689* (The University of Chicago Press 1977).

⁴ Richard S. Kay takes up Nenner's theme in relation to the period after Charles II's death in *The Glorious Revolution and the Continuity of Law* (The Catholic University of America Press 2014). Reviewed Sally Jane Gold 'The Glorious Revolution and the Continuity of Law' [2016] 37/1 *Journal of Legal History*, 109-111.

⁵ Boston executed Mary Dyer and others who refused to obey their ban.

English jurisdiction. The thesis identifies and explores the specifics of the law that lay behind that. This exercise has not been undertaken before.

2. Contribution of this Research

Introduction

There is a wealth of scholarly literature concerning early Quakers, which is written, predominantly, from the perspective of Quaker history. With the important exception of Horle,⁶ whose book (which I discuss in detail below) provided the impetus for this research, few such works expound the law of this particular period. This thesis brings the substantive law in from the periphery of the historical narratives, which focus upon persecution, to the centre of analysis.

In this section, I outline the main strands in the literature with which this thesis engages.⁷

Radical Quakers?

The way that Quakers have portrayed themselves over the centuries is reflected in their historiography⁸ which has emphasised, and correspondingly downplayed, different elements at different times. I am particularly interested in the 'radical' element to early Quakerism because I believe that this persisted into the Restoration and provides a telling context for their encounters with the law. The question of whether Quakers were 'radical' is vexed. I discuss the use of this term in Section Three of this chapter.

⁶ Craig Horle, *Quakers and the English Legal System, 1660-1685* (University of Pennsylvania Press 1988).

⁷ A large body of work analyses the origin, development and nature of Quaker theology, with which this thesis is not concerned. The theology of the major early Quaker writers is discussed in *Early Quakers and Their Theological Thought 1647-1723* (Stephen W. Angell and Pink Dandelion (eds) Cambridge University Press 2015).

⁸ The historiography, including sociological studies, is analysed in 'A survey of Quaker historiography' *The Creation of Quaker Theory*, Pink Dandelion (ed) (Ashgate Publishing 2004).

Christopher Hill's interest, from a Marxist perspective, in the political and religious groups who were active under Cromwell, includes Quakers.⁹ Barry Reay took up the cudgel more specifically in relation to Quakers; although his main focus was with the history of Quakers prior to the Restoration. Their schools of thought highlight social and political radicalism in early Quakers. Although I am primarily concerned with the period 1660–1685,¹⁰ I argue that this research shows that Quakers' original beliefs persisted. This accords with recent scholarship, particularly on the theology of early Quakerism which draws out the continuance of radical theological thought.¹¹ This analysis, however, does not wholly accord with that of Quaker historians such as Braithwaite, who wrote the classic histories¹² and Moore,¹³ who examined their intellectual and theological history. They believed there was 'quietening' of the movement in response to persecution.

William Penn, who became a Quaker around 1666, wrote their first history in 1694. George Fox's *Journals* were published in 1696.¹⁴ In general, these early accounts are regarded as historically reliable but, some of the ideas and activities of the very early Quakers, such as serving in the army, and extreme political views, are submerged as against their claims to innocence, loyalty and pacifism.¹⁵ Due to the intense persecution to which they were subjected in the Restoration,

⁹ Christopher Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution* (4th Edition, Penguin Books 1991).

¹⁰ This is explained in Chapter One.

¹¹ I am grateful to Madeleine Ward who kindly shared her views and referred me to her article, 'Transformative Faith and the Theological Response of the Quakers to the Boston Executions' [2016], 21/1 *Quaker Studies* 15-32. Also, Robert Williams, 'The Radical Origins of Quaker Spirituality: The Reconceptualisation of the Divine in the Transition Space of the English Civil War' (Conference of Quaker Historians and Archivists, University of Massachusetts, Amherst, June 2018).

¹² William C. Braithwaite *The Beginnings of Quakerism* (Macmillan and Co. 1912), and *The Second Period of Quakerism*, (Cambridge University Press 1952).

¹³ Rosemary Moore, *The Light in their Consciences, The Early Quakers in Britain, 1646-1666*, (Pennsylvania University State Press 2000).

¹⁴ These accounts evince pride in their form of witness to God and their survival through persecution which was a huge achievement. By the time that they were able to so write publicly, the Religious Society of Friends was established and recognised as a religious denomination outside of the established Church. This thesis is not, however, an analysis of the resulting developments in the law, such as the Toleration Act, 1689.

¹⁵ their 'object in writing was to edify and confirm in their faith people living at the end of the story for which the beginning meant little,' Hill (n9) 231.

Quakers distanced themselves from certain elements in order to differentiate and define the position of the Religious Society of Friends.

Suffering and its Relationship with the Law

Braithwaite's classic histories of early Quakers¹⁶ provide narrative historical accounts of the external political environment and the internal development of the Quaker movement. They provide compelling examples of their persecution.

A system of recording sufferings in every established Quaker group, or meeting, in the country, was implemented. This was formalised in the 1670s to include reporting periodically to London and recording in the Great Book of Sufferings¹⁷ on a county-by-county basis. This, and Besse's collections of the same, feature as primary source material in most histories of the early Quakers and reinforce a collective memory of the law as oppressive and persecutory.¹⁸ However, Peters says ¹⁹ 'Although compilation and publication of sufferings form an important part of the Quaker denominational tradition, there was also an immediate practical purpose in the publication of 'sufferings' which has been insufficiently emphasised: examples of trials were published to rehearse the key issues of state interference in religion' and 'to highlight the inadequacies of laws which were used to govern religious practice.' Murphy²⁰ further shows that Penn was keen to draw attention to the trials in which he was involved. This is an important theme which emerges from the examination of their experience throughout this thesis.

Early Quakers regarded spiritual and temporal suffering as a test of faith similar to that which Christ had endured, and they identified with early Christian martyrs.²¹ Besse held a positive view of martyrdom.

¹⁶ Braithwaite (n12).

¹⁷ The Great Book of Sufferings, YM/MfS/GBS 1650-1685 (Quaker Archive).

¹⁸ It is fair to add that, whilst they write from a sympathetic Quaker perspective, neither Horle nor Braithwaite are uncritical of early Quakers and they point out inconsistencies and selectivity in their testimonies.

¹⁹ Kate Peters, *Print Culture and Early Quakers* (Cambridge Early Modern Studies, Cambridge University Press 2005) 204.

²⁰ Andrew R. Murphy, *Liberty, Conscience and Toleration, The Political Thought of William Penn*, (Oxford University Press 2016) examines Penn as a political force.

²¹ Moore (n13) 160.

Their view was that persecution was God's instrument, which he may or may not use to further his ends in the world²² and that God would end injustice. Moore traces a 'theology of suffering' from the mid-1650s, whereby 'Quaker faith and Quaker experience of persecution were found to reinforce each other... It also reflected a medieval spiritualisation of the cross.'²³

This provides a theological context to seemingly perverse attitudes, when examined from a legal perspective. The belief in the necessity of enduring persecution and its ultimate benefits explains what Horle has described as their 'studied refusal to co-operate' which '...added to their burdens while ironically reinforcing their belief that the system was unjust.'²⁴ In short, there is a sense that instead of being relentlessly persecuted by the law, the Quakers courted avoidable legal penalties by publicly flouting the law.

Consequently, they posed a serious challenge to the secular and ecclesiastical authorities, locally and nationally, undermining and threatening the political and economic stability of both church and state. This was the government's rationale and the view of many local justices, as echoed in the opinion of mainstream historians. Spurr,²⁵ for instance, supports the 'heroic efforts of ...zealots' who prosecuted non-conformists. Those 'zealots' include several of the individuals whose papers I will explore. Some of the cases that I will examine indicate a blatant abuse of what might properly be called the spirit of the law. An important question arises as to whether this arose through ignorance or malice, or was done knowingly for strategic reasons. Magistrates had to deal with Quakers' adamant and persistent refusal to comply with the law. There are also examples of what we would nowadays regard as contempt or casuistry on the Quakers' part.

²² Madeleine Ward, 'Transformative Faith and the Response of the Quakers to the Boston Executions' [2016] 21/1 Quaker Studies 23.

²³ Moore (n13) 161.

²⁴ Horle (n6) 170.

²⁵ John Spurr, *The Restoration Church of England, 1646-1689* (Yale University Press 1991) 55.

Antipathy and Autonomy amongst Local Officials

Reay²⁶ and Braithwaite²⁷ opine that local JPs took the initiative in persecution. Quakers were opposed to the magistracy in the sense that they believed their role should only be to punish evildoers and to maintain God's law. This fundamental clash of approach may have influenced their thinking and informed the view that is promulgated by some historians, that JPs were instrumental in the administration of the law to the detriment of Quakers. I critically analyse this interpretation, particularly in Chapters Three and Four. Many magistrates and justices were enjoined to apply the law by virtue of their positions and were more scrupulous than some Quaker historians believe. The wording of the 1662 Quaker Act and the 1664 and 1670 Conventicles Acts shows that Parliament placed the onus on JPs and minor local officials to 'deal with' Quakers. Further, Deputy Lord Lieutenants had a significant role which needs to be considered in any examination of localism in this period and I address this in Chapter Three.

A further consideration is the extent to which local legal administration followed central direction. The dialogue between central and local authority is evident both in relation to Quakers – as between their London base and the regions – and in the communications between the King's government about how local officials should act.

Accounts of Quakers and the Law

Mullett²⁸ and Reay²⁹ provide historical accounts of the legislation that was brought into effect against Quakers. Reay and Braithwaite³⁰ maintain Quakers' criticism of the application of such laws against them and, like Horle, whose work I discuss next, continue the theme that this was due to religious bigotry.

²⁶ Barry Reay, 'The Authorities and Early Restoration Quakers' [1983] 34/1 *Journal of Ecclesiastical History* 69-84.

²⁷ William C Braithwaite (n12).

²⁸ Charles F Mullett, 'The Legal Position of English Protestants Dissenters, 1660-1685' [1936] XXII *Virginia Law Review* 495-526.

²⁹ Reay (n 26).

³⁰ Braithwaite (n12).

Craig Horle has written the most comprehensive account of the law relating to Quakers in the Restoration period. However, he refers to a dearth of studies with specific reference to legal procedures and religious dissent³¹ and to a lack of county-based studies of Quakers and the law in this period.³² This thesis contributes towards this lack of research.

I explore the local effect and use of laws against Quaker activity in more detail than has been undertaken so far. Mullet's close local study of religion and politics in Restoration Cockermouth³³ shows the cruel effect of anti-dissenting politics upon a non-conformist minister, Larkham. *The Ejected of 1662 in Cumberland and Westmorland*³⁴ traces the outcomes for local independent ministers who had been unable to practice in the Interregnum but were penalised after the Act of Uniformity 1662.³⁵ Morgan³⁶ examined the relationship between Quakers and the establishment in Lancashire, particularly the area 'north of the sands' that is Furness and North Lancashire. It covers, in its early sections, the same period as this thesis, although it ranges beyond the Restoration up until 1730 and examines local Quakers' relationships with the establishment, as broadly defined.³⁷ This thesis is distinguished from Morgan's work, and other county-based studies, in its specific focus upon mid-seventeenth century law in the wider North West and in its discussion of ecclesiastical law.

Horle describes a potentially bewildering system of law as a 'quagmire.'³⁸ I seek to explain the seemingly incomprehensible aspects of the law that Quakers encountered.

³¹ Horle (n6) x-xi.

³² although there have been a number of local studies, (including published and unpublished theses) about early Quakers from other perspectives, such as seeking to establish quantitative demographics, looking at Quakers' social status, and in relation to social history.

³³ Michael A. Mullet, *Politics and Religion in Post Restoration Cockermouth* (Cumberland and Westmoreland Antiquarian and Archaeological Society 2013 Tract Series XXIV).

³⁴ B Nightingale, *The Ejected of 1662 in Cumberland and Westmoreland* (Manchester University Press 1911).

³⁵ 14 Car II c.4. This is discussed further in Chapter Two.

³⁶ Nicholas Morgan, *Lancashire Quakers and the Establishment, 1660-1730* (Ryburn Academic Publishing 1993).

³⁷ Ibid 11.

³⁸ Horle (n6) 26.

They were subject to a range of suits and prosecutions. Horle's approach is that their experience highlights the law's deficiencies in relation to religious toleration generally and Quakers in particular.

Dissenting religious thought was not, of course, confined to Quakers who were only one of the disparate groups contending for a law that fostered religious freedom, and who objected to the liturgy and/or the role of bishops in the Church of England. Richard Ashcraft,³⁹ Goldie et al⁴⁰ emphasise the role and importance of the dissenters in Restoration politics. This divisive religious issue came to the fore from the 1670s onwards. It is important in that it affected the way in which certain laws were applied towards dissenters, although, as I will show, civil, criminal, and ecclesiastical law was used against dissenters in general, in different measure throughout the Restoration. Quakers distinguished themselves from other non-conformists in the Restoration years through their direct challenge to and confrontation with the law.⁴¹

Many of the proceedings and penalties that Quakers experienced applied to any member of society who flouted the law and some laws, such as those regarding tithes,⁴² had nothing to do with religious toleration. On the other hand, some legislation, such as the 1662 Quaker Act,⁴³ were specifically enacted by the Restoration Parliament against Quakers. I also show that certain discretionary laws and penalties were employed opportunistically, and sometimes, experimentally against dissenters.

To date there has been no comprehensive jurisprudential analysis of Quakers' attitude to law in this period and this thesis, which is an empirical study, does not attempt this.

³⁹ Richard Ashcraft, *Revolutionary Politics and Locke's Two Treatises of Government* (Princeton University Press 1986).

⁴⁰ Mark Goldie, (ed.) with Tim Harris and Paul Seaward: *The Politics of Religion in Restoration England* (Blackwell 1990).

⁴¹ Although it should be noted that there do not appear to be many similar, empirical, studies of the extent to which other dissenting groups challenged the law.

⁴² Tithe law is discussed in Chapter Seven.

⁴³ 14 Car II c.1.

Rogers⁴⁴ is one of the few who have looked at the nature of early Quaker's legal thought in this context as well as in relation to law reform which I discuss next. He states that Quakers used the term 'God's Law', meaning Mosaic Law and the 'internal Law of God', associated with the believer's conscience following their conversion. The theological emphasis was upon personal transformation.⁴⁵ Antony Pearson, one such convertor, wrote:

This Light of Christ by which all men are enlightened is the Ground of all good wholsom Laws, and every Law that is contrary to it is for condemnation by it. ⁴⁶

Thus, 'laws perceived as unjust by the individual conscience could be dismissed as usurpers of God's law'.⁴⁷ Quakers' attitude, that secular and ecclesiastical law were human constructs for pragmatic ends and that the true law was God's, would inevitably lead to conflict between them, the church and the state. As Moore says, 'no government can accept the right of people to choose which laws they will obey.'⁴⁸

Alfred W Braithwaite⁴⁹ argued that Quakers accepted the rule of law. I cite local examples of Quakers' behaviour, coupled with their corporate injunctions, that might lead one to question this, as well as how this fits the contemporary philosopher, Hobbes'⁵⁰ concept of law as a social contract.⁵¹

⁴⁴ R Michael Rogers, 'Quakerism and the Law in Revolutionary England' [1987] XXII Canadian Journal of History 149-174.

⁴⁵ Ward (n22) 17.

⁴⁶ Antony Pearson, *A Few Words to all Judges, Justices and Ministers of the Law in England* (London 1654) 6 (cited in Rogers (n44) 151).

⁴⁷ Rogers (n44) 151.

⁴⁸ Rosemary Moore (n13) 69.

⁴⁹ Alfred W Braithwaite, 'Thomas Rudyard Early Friends' "Oracle of Law," (Presidential Address Friends Historical Society, Journal of Friends Historical Society Supplement 27, Autumn 1956) 1-19.

⁵⁰ Thomas Hobbes, *Leviathan, or the Matter, Forme and Power of a Commonwealth, Ecclesiastical and Civil* (First published 1651, Blackwell's Political Texts 1946) 155.

⁵¹ His contemporary, the lawyer, Matthew Hale took issue with Hobbes. For an account of Hale's legal theory, see Harold J. Berman, *Law and Revolution II, The Impact of the Protestant Reformations On The Western Legal Tradition* (Harvard University Press 2003) 251-263.

The issue of conscience was central to Quakers' refusal to accede to many of the legal processes and became a matter with which legal authorities wrestled.⁵² Although, for Quakers, conscience was connected to 'obedience to God rather than autonomy,'⁵³ their defiance illustrates Saunders' ⁵⁴ point that conscience could challenge the concept of socially binding legal positivity. Rogers says the early Quaker writings reveal Quakers arguing they no longer needed positive law to govern their behaviour⁵⁵ which leant towards the Ranters' position. By the Restoration, they had moved away from public assertions of this kind. This possibly feeds into the view of 'quieting', but, as I argue, their behaviour constituted active resistance.

Law Reform

Peters⁵⁶ describes Quakers' engagement with the law through their publications in the antecedent years, which I discuss by way of Introduction to Quakers in Section 4 below. I take up her findings in relation to the contrast between that period and the legal restrictions in the Restoration period, and in relation to law reform.

In general, Moore ⁵⁷ and Braithwaite ⁵⁸ interpret the Quakers' Restoration strategy of engagement with the law, which is discussed below, as a response to persecution. I contend that the Quakers deliberately challenged it. Horle says that there is little evidence early Friends were involved in efforts to reform the law, but Rogers'⁵⁹ premise is that Quakers' attitude to law in the antecedent period was radical and this manifested itself in calls for law reform.

My research confirms that Quakers maintained a stance against aspects of the law that was consistent with the demands for law reform made from number of

⁵² This is discussed more particularly in Chapter Five.

⁵³ MGF Bitterman, *The Early Quaker Literature of Defence* (Church History, Vol.42, Issue 2, June 1973) 203-228 (as cited by Ward (n22) 21.

⁵⁴ David Saunders, *Anti-lawyers, Religion and the Critics of Law and State* (Routledge 1997) 8.

⁵⁵ Rogers (n44) 153.

⁵⁶ Peters (n19) *Print Culture and the Early Quakers*.

⁵⁷ Moore (n13).

⁵⁸ William C Braithwaite, *The Second Period of Quakerism* (Cambridge University Press 1952).

⁵⁹ Rogers (n44). This article was published after Horle's book.

quarters during the Interregnum. Their call for neighbourhood courts and juries, for example, was a Leveller proposition.⁶⁰ The Quaker, George Bishop, wanted to *smite* the lawyers. In common with Levellers, they wanted the right to represent themselves in court, the right of defendants to call witnesses and trial by jury. Edward Billing advocated the reform of appeal procedures.⁶¹ They also demanded that the law be simplified and written down.⁶² They criticised judges who, they suggested, should be elected annually by consent of the people. Quakers argued that law-makers should legislate on the basis of their experience of God's law within themselves.⁶³ Quakers had no truck with the clergy at all, refusing to acknowledge their legitimacy, and, by extension, that of ecclesiastical law and its financial demands. In other words, it was not only religious freedom that they desired. They wanted radical and wholesale change to reflect their view of Christian society and a legal framework to accommodate all of this.

Quakers, like other critics, contended that fees corrupted the legal system and tempted judges to favour the rich. However, it is worth noting the JPs' oath, that is referred to in Chapter Five, which required them to swear to the opposite. Fees were required to commence and pursue both secular and ecclesiastical proceedings. It is axiomatic that any legal system that requires its participants to pay fees in order to engage the process is weighted against the poor but it does not necessarily follow that judges then favour the rich in any suit. There is evidence, particularly in Chapter Four of judicial sympathy towards the poorer Quakers. What is more evident in this study of the Restoration period is their Anglican bias which influenced how judges interpreted and implemented the law.⁶⁴

The demands for reform made from a number of quarters were sufficiently serious to have been addressed by Lord Justice Hale's commission in 1652. His

⁶⁰ Horle (n6) 172 (footnote).

⁶¹ Edward Billing, *The Mite of Affection* (London 1659) 5-6 cited by Rogers (n45) 168.

⁶² George Fox, *Fifty-Nine Particulars laid down for the Regulating things, and the taking away of Oppressing Laws and Oppressors, and to ease the Oppressed* (London 1659).

⁶³ Rogers (n44) 153.

⁶⁴ Specific examples are contained in Chapters Three and Four.

recommendations were not implemented, because of the political climate⁶⁵ and the problems remained at large.⁶⁶

Horle, accordingly, regarded the law as 'primitive.'⁶⁷ Some of the deficiencies to which he refers, such as lack of specific information as to the nature of criminal charges and the jury system, of course, applied universally rather than specifically to Quakers.

Quakers' Legal Strategy

Introduction

Horle explains that 'initially, their defence against prosecution relied heavily on their concept of equity...and their belief that religious testimonies should not be prosecuted if legitimately held.'⁶⁸ This meant that they had to navigate a perilous relationship between dissent and religious orthodoxy. During the Restoration, Quakers developed a strategy in relation to the law that was put into operation against them. This took several forms.

Engagement with the State

By virtue of the Clarendon Code,⁶⁹ Quakers were excluded from civil office, membership of parliament or the professions, and, effectively as such, from direct political influence or roles. However, they embarked on an engagement process with the state. This took the written form of campaigning and petitioning, and the physical form of active non-compliance with those aspects of the law with which they disagreed. Petitioning was a legitimate means for bringing not only individual legal challenges but political protest to the attention of parliament and the King, who could be petitioned directly.⁷⁰ The famous

⁶⁵ M. Cotterell, 'Interregnum Law Reform, The Hale Commission of 1652' [1968] *English Historical Review* 689-704.

⁶⁶ Barbara J. Shapiro, 'The Restoration chapter in the history of English Law Reform' [2016] *10/1 Law and Humanities* 31-58 See also her earlier article 'Law Reform in Seventeenth Century England' [1975] *19/4 The American Journal of Legal History* 280-312.

⁶⁷ Horle (n6) 203-4.

⁶⁸ Horle (n6) 163.

⁶⁹ The Corporation Act 1661, The Act of Uniformity 1662, The Conventicles Act 1664 and The Five Mile Act 1665.

⁷⁰ Robin Handley, 'Public Order, Petitioning and Freedom of Assembly' [1986] *7 J Legal History* 123.

treatises setting out their beliefs, such as Penn on Oaths,⁷¹ constituted petitions of this nature and, in Chapter Six, I cite Rudyard's petition⁷² regarding Elizabethan and Jacobean legislation aimed at Catholics being used against them.

Horle suggests that Quakers were ill-informed about the legal system⁷³ and tended to use clichés such as 'free born Englishmen,' 'fundamental law' and references to Magna Carta, often taken out of context. Many of the sources that I cite support this, unfortunately. They often contain compelling arguments regarding unfairness and detailed reference to the historical background of the area of law that they were addressing but muddy the argument with their own form of special pleading, namely that the law should not be applied to them, because they have no choice but to follow God's law, asserting their own innocent intentions. Ward⁷⁴ says that the claim to innocence was a rhetorical device which created an 'interplay between innocence and the guilt of the prosecutors.'

Legal Advice

By the 1670s, Quaker leaders rethought their position of passive resistance and obtained legal advice, from several counsel, as to the interpretation of the law that they were encountering and the extent to which the operation of such law could be resisted. The advice is recorded in *The Book of Cases*,⁷⁵ which is a primary source that deserves attention. It reveals a practical side of legal engagement between client and legal advisor in this era. I disagree with Horle's view that Quakers' legal questions lacked sophistication.⁷⁶ They composed reasoned, precisely-phrased questions that reflected their communal experience and the book reveals an intelligent, if one-sided, approach to questioning the law.

⁷¹ William Penn, A treatise of oaths, containing several weighty reasons why the people called Quakers refuse to swear (London 1675) (Library of the Society of Friends, SR 059.5 PENN.)

⁷² Thomas Rudyard, *The Case of Protestant Dissenters of Late Prosecuted on Old Statutes Made Against Papists and Popish Recusants (1680)* Box 154.1.40 (Quaker Archive).

⁷³ Horle (n6) 162.

⁷⁴ Ward (n22) 15-32.

⁷⁵ *The Book of Cases*, YM/MfS/BOC/1 (Library of the Religious Society of Friends). Volume 1 relates to this research period. Its importance to this thesis is discussed in the Methodology Chapter.

⁷⁶ Horle (n6) 189.

They show attention to detail and even challenged counsel on occasion: *Counsel will please clarify his answers ...*⁷⁷ Counsel responded to each question in turn exactly as in modern practice.

Horle does not entirely trust the lawyers who advised Quakers (especially Thomas Corbett) as to their provision of accurate advice: he thinks that they advised what Quakers wanted to hear. This is difficult to judge at this distance in time. In some cases, such as withholding tithes, the barristers appear to have been trying to find a solution to extremely difficult questions posed by clients who were deliberately putting themselves in positions contrary to the law. In others, they were grappling with potential abuse of the law by justices in unusual situations, such as the vexed question of authority to break open doors under the new Conventicles Acts.⁷⁸

Appeals and Jurisdictional Challenges

Quakers' willingness to pursue appeals (which is discussed in several chapters) to the limited extent that these were available, or feasible, also formed part of an engagement with legal process. Similarly, they fairly readily challenged jurisdiction.⁷⁹ The outcomes of some of these are unknown or unsatisfactory as will be seen. It should be noted that there was some ambivalence on the part of the London meeting in October 1675, over the use of the law to defend themselves: this reflected the tension between their view that God would end injustice and their increasing realisation that the application of the law was taking a course that they could not continue to tolerate.⁸⁰

Internal Discipline

The Society of Friends became more centralised during the Restoration and they imposed discipline upon behaviour both within the Quaker community and with

⁷⁷ Book of Cases (n75).

⁷⁸ See Chapter Four.

⁷⁹ especially over tithes, as will be seen in Chapter Seven.

⁸⁰ Greaves Richard L. 'Shattered expectations? George Fox, the Quakers, and the Restoration State, 1660-1685' [1992] 24/2 Albion: A Quarterly Journal Concerned with British Studies 237-259. The North American Conference on British Studies <[www.jstor.org/stable.4050812](http://www.jstor.org/stable/4050812)> accessed: 10-04-2018.

regard to their interaction with the wider population and the state. Discipline was imposed upon the contents of printed or published works, and upon behaviour. From the 1670s, an internal certification system for travelling Quaker ministers was imposed. Quakers centrally issued instructions and provided guidance on how to maintain their positions against the law, as well as assistance with costs and accommodation for Friends who were summoned to courts in London.

When viewed through a legal prism, it is striking that the internal discipline that was imposed by Quaker leaders included an insistence upon maintaining positions that were directly counter to the prevailing law. This was notwithstanding the very severe penalties that were imposed upon individual Quakers at all levels of society. In other words, the discipline was concerned with maintaining witness to what Quakers regarded as God's law and not, necessarily, to obedience to national laws. This may partly account for the indications, within both national and local sources, that the government took certain proceedings strategically against Quaker leaders, because they perceived that they had a strong influence upon the rank and file.

Quakers' economic, political, physical and social wellbeing was adversely affected. Yet, the majority of Quakers, whether through their own strong belief or through discipline, refused to recant under pressure. The local examples illustrate how the mass of ordinary Quakers suffered repeatedly, despite their central organisation's petitioning and avowments, and the vacillating attitudes of central government. I show through local primary sources that there were instances of internal dissent which were quashed by the leadership. This was particularly marked in relation to tithes as examples in Chapter Seven reveal.

Ecclesiastical Legal History

Upon the re-establishment of ecclesiastical jurisdiction at the outset of the Restoration, ⁸¹ there were two separate but concurrent jurisdictions.

⁸¹ This is the subject of Chapter Two.

Ecclesiastical law was part of the general law of England and the confluence of ecclesiastical and secular law resonates throughout this thesis. I believe that the way in which ecclesiastical law impacted on Quakers is under-appreciated and I address ecclesiastical law with which Horle does not substantively engage.

A review in May 2005,⁸² pointed to a lack of legal historiography concerning the fact that, notwithstanding the accretion of power towards the temporal courts in the early modern period, the reach of the ecclesiastical courts remained considerable and affected everyday life for the whole population. There is an authoritative view that the importance of the ecclesiastical courts in the lives of the general population may, in fact, have increased following ecclesiastical legislation brought in under the Tudors and early Stuarts.⁸³ Many of the works on the ecclesiastical courts in this period are predicated upon charting or accounting for the decline of ecclesiastical jurisdiction and influence.⁸⁴ Helmholz and Hill were concerned with a long-term view of ecclesiastical law up until 1640. Hill acknowledges both the retrospective nature of his work, and the possibility that study of the period immediately following may shed a different light.⁸⁵ This study is not along the lines of what he envisaged but the instances of the operation of the law in the case studies show that the restored ecclesiastical courts in the Restoration period were active and retained a deal of power over the life of every day citizens. I show how they were facilitated in this in relation to non-conformists by parliamentary legislation as well as canon law.

This thesis is not attempting to contribute to the overall exploration of the decline of the ecclesiastical courts. Instead, it explores the actual operation of ecclesiastical courts at the given point in time, in so far as this involved Quakers.

⁸² John W Cairns, 'RH Helmholz, The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s, The Oxford History of the Laws of England Vol.1' [2008] 9/2 Edinburgh Law Review 333-335.

⁸³ Richard Helmholz, *The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford University Press 2004) (Oxford Scholarship Online) 25.

⁸⁴ See, for example, Outhwaite, RB, *The Rise and Fall of the Ecclesiastical Courts, 1200-1860*, (Cambridge University Press 2000), and Till, B. D. *The Administrative System of the Ecclesiastical Courts in the Diocese and Province of York. Part III. 1660-1883. A Study in Decline* (Unpublished manuscript, Borthwick Institute, York 1963).

⁸⁵ Christopher Hill, *Economic Problems of the Church, From Archbishop Whitgift to the Long Parliament* (3rd edition, Clarendon Press Oxford 1968) 351.

What this importantly, reveals, however, is the wider impact of ecclesiastical jurisdiction and its intersection with the secular law, particularly in relation to penalties. It is necessary to appreciate the limits to enforcement on the outcome of ecclesiastical proceedings and the practical effects of their relationship with the secular courts for the purpose of imposing penalties which I show to have been crucial to the Quakers' experience. There is a paradox between the nature and aims of canon law as essentially conciliatory and the way in which it was operated in practice.

Particularly important areas where the ecclesiastical and secular legal processes combined are expounded in the dedicated Chapters on Tithes and Excommunication. Horle refers to Quakers' sufferings in relation to tithes but he does not explain the law behind that. This is a neglected area of legal history generally and I have explored it in some detail in Chapter Seven. Horle's account of excommunication is sketched and the subject also merits further examination. I believe that he has underestimated the nature and scale of excommunication so far as Quakers were concerned and Chapter Eight focuses upon this.

There are a number of works that deal with the re-establishment of the Church of England upon the Restoration. I have drawn upon some of these⁸⁶ in Chapter Two but I have approached this from a specifically regional perspective and in relation to its affect upon Quakers.

⁸⁶ Particularly: Paul Seaward, *The Cavalier Parliament and the Reconstruction of the Old Regime, 1661-1667* (Cambridge University Press 1989); R.S. Bosher, *The Making of the Restoration Settlement: The Influence of the Laudians 1649-1662* (Dacre Press 1951) (cited in Anne Whiteman 'The Re-establishment of the Church of England, 1660-1663' [1955] 5 Transactions of the Royal Historical Society 111-131; Spurr (n25)).

3. Terminology

Quakerism

The Quakers' formal name is the Religious Society of Friends. The epithet 'Quakers'⁸⁷ is employed in the interests of brevity and narrative ease. Quakers refer to themselves as 'Friends' and so this term also occurs.

It is important to note that membership of the Society of Friends became defined from the late 1650s onwards as part of the developing disciplinary structure of the society but the primary sources studied show that the epithet was loosely used by state and church officers and agencies. Such authorities did not always distinguish between formally designated members of the Society and other Protestant dissenters. Conversely, in other cases, they definitely did, and this will be made apparent.

Non-conformism

The Act of Uniformity 1662,⁸⁸ by its recital, and sections VI and XV, first used the term non-conformists. The term 'dissenters' came into use after the Toleration Act of 1688,⁸⁹ but was commonly used to describe non-adherents to the Church of England before then. In the main, I use the term dissenters when referring to all groups, not just Quakers, and non-conformists when this term carries a specific connotation within a particular section. Contemporary opponents of Quakers often referred to them as *Fanaticks*, and this term crops up in several of the primary sources.

Radicalism

Radicalism has meant different things at different times. Clark⁹⁰ cautioned that the term 'radical' in the seventeenth century did not carry the same connotations as in the nineteenth century in relation to parliamentary reform, or its modern usage as denoting belief in extreme political or social change. In the seventeenth

⁸⁷ attributed to Justice Bennet of Derbyshire who, in 1650, according to their founder, and early leader, George Fox, "called us Quakers because we bid them tremble at the word of God." See also Peters (n19) 91-123 for a discussion of their appropriation of the term.

⁸⁸ 14 Car II c 4.

⁸⁹ 1 Will and Mary c18.

⁹⁰ JCD Clark, *English Society, 1660-1832* (2nd ed, Cambridge University Press 2000) 8.

century, it meant primitive, original or implanted by nature.⁹¹ Hill⁹² emphasises the 'radical' nature of many groups who were active in Cromwell's time; his argument (crudely summarised) being that a radical current in the modern sense existed but that the accommodation which groups such as Quakers made following the Restoration, and the crushing or dying out of others was, in effect, a missed opportunity to establish a more democratic, less bourgeois society.

Although Hill's interpretation has been challenged⁹³ as described by Peters,⁹⁴ De Krey also discusses the use of the term 'radical'. He differentiates between 'the designation of political behaviour and attitudes as 'radical' according to nineteenth century meanings and considers it acceptable to apply the term to those who asked 'persistent and fundamental questions' of authority in 'contexts involving political, religious and socio-economic tensions'.⁹⁵

Greaves acknowledges a 'conscious anachronism' with the term 'radical underground' in his first book⁹⁶ and expands on this in the Preface to his second.⁹⁷ I have followed Greaves's explanation in his Preface as to employing the word radical as 'a useful tool of communication.' He restricts his use of the term to 'those who espoused active disobedience of the law, particularly in the form of such activities as rebellion, assassination, the publication of allegedly seditious literature, and the use of violence to prevent legally constituted authorities from enforcing the law.' So far as Quakers in the Restoration period were concerned, they fell within the ambit of 'those who espoused active disobedience of the law and the publication of allegedly seditious literature' and (I add) the dissemination of allegedly seditious literature. From 1661, Quakers,

⁹¹ This definition is from Samuel Johnson's dictionary, quoted in Clarke *ibid* 8.

⁹² Hill (n9).

⁹³ J C Davis, 'Radicalism in a Traditional Society: The Evaluation of Radical Thought in the English Commonwealth 1649-1660 [1982] 3/2 History of Political Thought 193-213.

⁹⁴ Peters (n) 5-6.

⁹⁵ Gary S De Krey, 'Rethinking the Restoration: Dissenting Cases for Conscience, 1667-1672' [1995] 38/1 The Historical Journal 53-83 Cambridge University Press.

⁹⁶ Richard L Greaves, *Deliver Us From Evil, The Radical Underground in Britain 1660-1663* (Oxford University Press 1985) 4.

⁹⁷ Richard L Greaves, *Enemies under His Feet, Radicals and Non-Conformists in Britain, 1664-1677* (Stanford University Press 1990) vii-x.

through their leaders, disavowed violence and they advanced a peaceful testimony. I do not wish to claim that my research has unearthed new evidence of violence on the part of Quakers, but their association with rebellion in the earlier years is hard to ignore.

Many of the men who were attracted to Quakerism in its early days were members of the New Model Army,⁹⁸ and, self-evidently were not opposed to fighting. I refer, in Chapter Three, to a range of sources pertaining to Restoration law prohibiting Quakers' meetings. These show Quakers' associations with radicals and more accurately fit Greaves' definition. In addition, I argue that Quakers rebelled against aspects of secular and ecclesiastical law and that they should be counted amongst those who sought radical revision of the law.⁹⁹

4. Introduction to Early Quakers

This section traces Quakers' beginnings within the prevailing political and legal context. It indicates the marked change that occurred upon the Restoration of Charles II, the effect of which is the concern of the rest of the thesis.

The Emergence of Quakerism in the North West

The Quaker movement evolved during the maelstrom of the Civil Wars – a period that saw a proliferation of religious sects. These included Baptists and Familists and newer groups who, through spiritual torment, sought alternatives to the established church along broadly Puritan lines, with some Dutch Protestant influence.¹⁰⁰

⁹⁸ The Army that Parliament established in 1645 which was composed of full-time professional soldiers and conscripts of anti-royalist, Puritan views.

⁹⁹ For the sake of completeness, although this is not pertinent to the substantive legal issues discussed in this thesis, there is also a controversial theory amongst Quaker scholars as described in the literature review of Daniel Slaley Zermaitis 'Convergent Paths: The Correspondence between Wycliffe, Hus and the Early Quakers' (PhD Thesis Birmingham 2012) 9-11, that early Quakers' religion reflected radical Christian mystical tradition.

¹⁰⁰ This connection endured and aroused suspicion as will be seen in Chapter Three.

Seekers were individuals who preferred meetings to religious services. They waited for God to declare himself and sometimes heard travelling ministers.¹⁰¹ Another group, Ranters, believed in an indwelling spirit, rejected hierarchy and held a challenging notion that there was no sin, or, if there was, it was part of God's plan.¹⁰² Ranters became despicable both in relation to the political threat that they imposed and their irreverent behaviour. Hill¹⁰³ makes an argument for a Ranter element in the early Quakers although Braithwaite says that Quakerism was an 'antidote' to Ranterism.¹⁰⁴ James Naylor, an early leading Quaker who was subsequently expelled, was previously a Ranter. The London-based Muggletonians held similar beliefs to Quakers.

The early Quakers appeared around 1646 but their establishment as a religious sect began in 1652 when George Fox, an itinerant preacher from the Midlands, began his mission through the historical North West. This region, which fostered Independents and Seekers, was susceptible to Fox's strong spiritual vision, moral line and charisma.¹⁰⁵ He advocated a non-hierarchical ministry that was open to men and women. Quakerism emphasised the inner conscience, and a transformative conversion experience.¹⁰⁶ Quakers held the view that Christ was present in the individual and accessible to those who sought him inwardly. A significant difference between Calvinist Puritanism and Quakerism, was the latter's belief in universal salvation as opposed to the former's belief in predestination.

Hugh Barbour's work¹⁰⁷ emphasised the Puritan influence upon early Quakers. As Puritans, a plain way of life, speech and dress were required. Gravestones were regarded as vanity and music and theatre as frivolities. Priests,

¹⁰¹ Of the smaller or less well-established groups there were Sabbatarians, Anti-Sabbatarians, Millenarists and numerous others, William C Braithwaite, *The Beginnings of Quakerism* (Macmillan and Co Ltd 1912) 13. There were also Individualist ministers.

¹⁰² Hill (n9) 207.

¹⁰³ Hill (n9) 231-258.

¹⁰⁴ Braithwaite (n99) 22.

¹⁰⁵ Ben Pink Dandelion, *The Quakers, A Very Short Introduction* (Oxford University Press 2008) 20.

¹⁰⁶ Moore (n13) 75-88.

¹⁰⁷ Hugh Barbour, *Quakers in Puritan England* (Yale University Press 1964).

churches,¹⁰⁸ the church calendar (Sunday, Easter and Christmas) and outward sacraments were rejected. They replaced the names of days and months with numbers and a ten-month calendar¹⁰⁹ because of their pagan origins. Quakers traded with fixed prices rather than haggling.

Quakerism gathered momentum when Fox converted Margaret Fell, the wife of Judge Thomas Fell who gave them protection. Their home, Swarthmoor Hall, Ulverston, Westmoreland, was the Quakers' first headquarters. Some local converts, such as Edward Burroughs, Francis Howgill, Richard Hubberthorne and William Dewsbury, became leading Quakers along with Fox. Morgan¹¹⁰ argues that the North West retained its more visionary ethos as against the pragmatism of the increasingly centralised London base that developed during the Restoration years.

The concentration of prominent Quakers in this area, as well as their influence upon their local membership, is one reason for strong local animosity towards them, alongside the ardent royalism of certain local gentry.

A hierarchical system of governance developed with local monthly, regional quarterly and yearly meetings.

Sociologically, Quakerism can be traced as having evolved from an unstructured movement to an exclusive sect to a religious denomination.¹¹¹ It is also likely that the persecution of Quakers itself increased their sense of common identity and cause and contributed to their consolidation and strengthening. The development of their theology, their internal structure and discipline (the latter

¹⁰⁸ They called them steeple houses.

¹⁰⁹ It is necessary, therefore, to be aware that Quaker records consequently refer to different dates than the standard calendar.

¹¹⁰ Morgan (n36) 280-281.

¹¹¹ although it has been argued that their evolution does not neatly fit such categorisations: Claire JL Martin, *Controversy and Division in Post Restoration Quakerism. The Hat, Wilkinson-Story and Keithian Controversies and Comparisons with the Internal Divisions of other Seventeenth Century Non-Conformist Groups*. PhD Thesis, (Open University 2003) 10.

not without internal controversy)¹¹² and their endurance are attributed, in part, to their increased institutionalism during the Restoration.

Political Implications of Early Quaker Beliefs

Early Quakers believed themselves to be in the vanguard of Christ's Second Coming, following Jeremiah 31:31-40 and Revelation 3.20.¹¹³ The prophesied date – 1666 – was close according to Revelation 20:1-8. Such eschatology chimed with that of the Fifth Monarchists, the political force that had been instrumental in the execution of Charles I. Fifth Monarchists sought to influence the composition of parliament in their favour and opposed the position of bishops in government. This was an enduring matter and affected the drafting of Caroline legislation against dissenters.¹¹⁴

In common with other non-conformists, Quakers sought freedom from the prescribed liturgy and episcopacy of the established Church of England and they opposed any theocratic Presbyterian system. They regarded the Roman Catholic and Anglican churches as corrupt. The concept of liberty to worship according to one's conscience and inward spiritual leadings was crucial to many religious and political groups in an era in which religion and politics were entwined.¹¹⁵

The early Quaker movement shared common ground with the beliefs and aims of more overtly political movements, such as Levellers and Diggers. Objection to property ownership, tithes, oaths, and antipathy towards the ruling hierarchies of church and state were common, to varying degrees. Diggers, led by Gerard Winstanly, advocated a form of agrarian communism. The Levellers' leader, John Lilburne, became a Quaker later on.

¹¹² For example, the notorious Wilkinson–Story controversy in the North West. William C Braithwaite (n58) 290-323 provides a detailed account.

¹¹³ Ben Pink Dandelion, *The Quakers: A Very Short Introduction* (Oxford University Press 2008) 5.

¹¹⁴ Seaward (n86) and as more particularly discussed in Chapter Two.

¹¹⁵ The manuscript of Sir William Clarke, a Chief Secretary to the Generals of the Army, contains a collection of the formal debates (British Library MFR 2700). The Putney debates portray the issues and the passion with which such views were held.

Leading Quakers were not shy of the political implications of their beliefs. Fox met Cromwell several times. From their inception, they challenged powerful local and national individuals, by proselytizing and petitioning.¹¹⁶ They felt it was their duty to point out injustice. Quakers raised their profile through self-promulgation.¹¹⁷

Quakers quickly attracted pervasive hostility, locally and nationally, from royalists, some members of the public, the gentry and the clergy.

In 1653, a minister at Kirby Stephen, Westmoreland, Francis Higginson¹¹⁸, published the following:

I here present you with a brief relation of the execrable irreligion of a sort of people lately started in some part of the north, commonly called Quakers ... Some of them, men and women, more like frantic people than modest teachers of the Gospel... run or stand in the streets or marketplace, or get upon a stone and cry "Repent." Kendal, and many other towns in these northern parts, are witnesses of these mad speakings and practices.¹¹⁹

Public remonstrance and going naked was, indeed, a feature of early Quakerism. Such practices continued until the early part of the Restoration. A pertinent instance is discussed in the Conventicles chapter.

The seemingly wild attitudes of some adherents to early Quakerism appalled many observers.¹²⁰ However, there is more to this tract than appears from Morgan's citation, as Peters¹²¹ tells us, because the burgeoning of religious freedom had legal connotations.

¹¹⁶ See Peters (n19) for details of their use of print for this purpose.

¹¹⁷ Peters (n19) 91.

¹¹⁸ in conjunction with William Cole, a minister in Newcastle.

¹¹⁹ 'A Brief Relation of The Irreligion of the Northern Quakers' in Hugh Barbour and Arthur Roberts (eds), *Early Quaker writings, 1650-1700* (Quaker books 2004), cited in Morgan (n36) 13.

¹²⁰ For a discussion of social antipathy see Barry Reay, 'Popular Hostility Towards Quakers in Mid-Seventeenth Century England' [1980] 5/3 *Social History* 387-407.

¹²¹ Peters (n19) 187.

The Legal Climate in which Early Quakers' Views could be Expressed

The wide-ranging theological views that were given scope for expression contained challenging interpretations of scripture and direct attacks on the Church of England and the political establishment. Whilst there was no legal framework to support the various alternative religious groups under Cromwell, there was a degree of facilitation in that there was freedom to debate and relaxation of legal printing controls. The New Model Army was a forum for discussion of political and religious ideals and programmes.¹²²

In 1643 and 1645, the prelacy and the Book of Common Prayer respectively, had been abolished. The aim was to substitute a Presbyterian system for which an Ordinance of 1648 was the operative legislative measure¹²³ although it did not gain traction.¹²⁴

Peters states that 'The Instrument of Government that underpinned Cromwell's Protectorate between 1653 and 1657 permitted any mode of Protestant religious worship, provided that individuals professed faith in God by Jesus Christ and did not disturb the peace.'¹²⁵ 'Parish ministries could be Presbyterian, Independent, Baptist or Anglican with many separated or 'gathered' churches ruled by local agreement.¹²⁶ However, Quakers' behaviour, as described in Higginsons' tract, was often regarded as disturbing the peace.

During these early years, Quakers took it upon themselves to challenge the clergy directly and then fell afoul of 1 Mary c.2 which made it an offence to disturb a preaching minister. Conversely, a penalty for failing to attend church every Sunday, under Elizabethan and Jacobean legislation,¹²⁷ was not enforced. It was not repealed though, and it came to the fore during the Restoration.

¹²² cf The Putney Debates, (MFR 2700, British Library).

¹²³ in so far as such ordinances were accepted as legal instruments: Firth CH and Rait RS (eds) *Acts and Ordinances of the Interregnum 1642-1660* (London 1911) iii-xxxviii.

¹²⁴ Braithwaite (n59) 15.

¹²⁵ Peters (n 19) 196 citing Firth CH and Rait RS, *Acts and Ordinances of the Interregnum 1642-1660* (London 1911) 822.

¹²⁶ Moore (n13) 5.

¹²⁷ as discussed in Chapter Six.

The Church of England's courts were disestablished, a reflection of profound criticism of ecclesiastical jurisdiction and court procedure.

Opponents of the various groups who had exercised their relative religious freedom considered that there was too much laxity that should be restricted by legislation. In 1650, the short-lived Blasphemy Act was enacted.¹²⁸ Its precise aim has been the subject of debate¹²⁹ but it was invoked against Quakers, partly because their belief in the presence of Christ within themselves was interpreted by opponents as tantamount to claiming that they were equal to Christ. According to Peters, Higginson's tract quoted above was one of the first designed for the purpose of framing a case for blasphemy.¹³⁰ The North West hosted several failed attempts to prosecute leading Quakers for blasphemy. One could argue, as did the early Quaker historians, that such attempts amounted to persecution for their religious beliefs, and that it had political motivation. Indeed, the successful prosecution, in 1656, of James Naylor for blasphemy for riding naked on a donkey in Bristol is generally regarded as having been politically motivated. Its legal aftermath caused a crisis within the Quaker movement and Naylor was disowned.

Peters suggests that Quakers were used as a political tool by the then Puritan orthodoxy and were presented by them as beyond the bounds of toleration and actually a threat to religious liberty.¹³¹ The notion that they were used as fall guys continued into the Restoration as shown by extracts from the State Papers that I cite in Chapter Three.

The Declaration of Breda

The Declaration of Breda, 4th April 1660,¹³² upon which Charles II's orchestrated return from exile in Holland was based, addressed the question of religious freedom and promised an accommodation:

¹²⁸ It was repealed in 1653.

¹²⁹ Peters (n19) 183, fn121.

¹³⁰ Peters (n 19) 183.

¹³¹ Peters (n19) 182.

¹³² HL/PO/JO/10/1/306, Parliamentary Archives.

And because the passion and uncharitableness of the times have produced several opinions in religion, by which men are engaged in parties and animosities against each other (which, when they shall hereafter unite in a freedom of conversation, will be composed or better understood), we do declare a liberty to tender consciences, and that no man shall be disquieted or called in question for differences of opinion in matter of religion, which do not disturb the peace of the kingdom; and that we shall be ready to consent to such an Act of Parliament, as, upon mature deliberation, shall be offered to us, for the full granting that indulgence.

The republic during which Cromwell governed came to a sudden end in 1660 and 'surprised the radicals.'¹³³ However, the ideals and issues behind it did not cease so suddenly. Quakers, like Baptists, were one of the few organised dissenters who had opposed the political and religious order and survived beyond the Restoration. Muggletonians faded away; likewise, the unstructured groups such as Ranters and Seekers. Overtly political groups such as Diggers and Levellers were crushed.¹³⁴

When the Restoration was agreed, Edward Burroughs pamphleted the King and parliament declaring the Quakers' belief that the previous government's fall was God's purpose, that they were obedient servants and they hoped that the new government would offer freedom of conscience. However, they would bear persecution and would not use *carnal weapons*. Whilst declaring their loyalty, Burroughs affirmed that the Quakers would endure persecution if necessary.

The Quakers might not have suffered religious persecution had the aspirational Declaration of Breda been reinforced by legislation and had there been a favourable climate towards toleration. Of course, the denouement was the creation of a distinct, adverse, legislative framework and the re-implementation of Elizabethan and Jacobean legislation promoting conformity to Anglicanism that had been ignored.

¹³³ Moore (n13) 175.

¹³⁴ For a concise, but detailed examination, see Hill (n9).

In marked contrast to the Interregnum years, censorship was re-introduced with a vengeance. Roger L'Estrange, who controlled the Stationers Company, was its enforcer.¹³⁵ Quakers both published and disseminated material that was regarded as seditious. Many surviving tracts are anonymous, presumably so as to avoid L'Estrange tracking down their authors. The tracts that I cite deal with a variety of legal issues within a dissenting religious polemic. I point to this as evidence that some legal issues were the subjects of controversial, and apparently censored, debate.¹³⁶

5. Thesis Structure

Overview

The thesis is not arranged chronologically, but by way of subject matter. This is because its structure is designed to provide a corpus of mid-seventeenth century law within the context of Quakers' experience as religious dissenters in a hostile political climate. It also reflects the principle points that resulted in their incurring legal penalties, as set out above. However, I have endeavoured to incorporate precise chronological details within the individual chapters and a simple chronology is appended for ease of reference regarding key events and corresponding changes in the use and operation of the law.

So far as the religious establishment was concerned, Braithwaite and others mention religious bigotry and the clergy are condemned en masse for their hostility towards Quakers, but the histories cited above rarely engage with ecclesiastical law with specificity. To address this lacuna, a series of chapters is dedicated to describing the re-establishment of the ecclesiastical courts in the years following the Restoration, together with a range of ecclesiastical laws, and

¹³⁵ Richard Greaves *Deliver Us from Evil, The Radical Underground in Britain, 1660-1663* (Oxford University Press 1985); and *Enemies Under His Feet, Radicals and Non-Conformists in Britain, 1664-1677* (Stanford University Press 1990) explain L'Estrange's activities within this context. For more detail, B. Lynch, Dunan-Page, A (Eds) *Roger L'Estrange and the Making of Restoration Culture* (Routledge 2008).

¹³⁶ The nature and reasons for the selection of such primary source material are described in the Methodology.

their respective procedures and penalties, with particular reference to the local operation of the same in the Northern Province, which governed the North West. The Appendix contains full texts of selected primary sources.

Sequence of Chapters

This Chapter has outlined the main themes of the thesis, introduced Quakers and indicated its contribution to the literature.

Chapter One describes the methodology and research strategy that has been employed. This provides the rationale for selection of the primary sources, and evaluates their contribution as evidence. It expounds upon Besse's records of sufferings. It also discusses the difficulties regarding quantitative studies concerning proceedings against Quakers.

Chapter Two looks at ecclesiastical law, court structure and processes, and the roles of ecclesiastical legal officials, with reference to the re-establishment of ecclesiastical jurisdiction in the Northern Province. This Chapter also introduces the 1662 Act of Uniformity. It concludes with examples of local studies that show Quakers' experience of ecclesiastical financial penalties and of visitations.

Chapters Three and Four look at the law relating to meetings, or conventicles, which was one of the prime causes of proceedings against Quakers. Aspects of this will be familiar to readers who are conversant with early Quaker history but I draw attention to less well-known sources that shed light upon attitudes and influences. I examine the legislation and the various interpretations of it as well as local examples of the effect of the respective laws.

Chapter Five looks at the under-appreciated range of seventeenth-century law relating to oaths and covers both secular and ecclesiastical legal requirements for oaths. It provides examples of Quakers' experience upon their refusal to swear oaths. This leads, in Chapter Six, to a discussion of the penalty of praemunire – a draconian measure that involved sequestration of estates to the King. This was employed from early in the Restoration, especially against those

who refused the oath of allegiance, and through the controversial use of Elizabethan and Stuart anti-Catholic legislation. The latter, commonly termed the Acts against Popish Recusants, are also explored in this Chapter.

Chapter Seven concentrates upon the body of law relating to tithes as it had developed into the mid-seventeenth century. Tithe law comprised ecclesiastical law, secular (especially Tudor legislation) and custom and practice. This chapter places Quakers' refusal to pay tithes in their social, political and economic contexts and provides local examples of their experience. Here they suffered very high fines and distraint of goods and the reasons for that will be explained.

Chapter Eight examines the ecclesiastical penalty of excommunication. My research reveals a misconception about the penalty and it challenges a common view that excommunication did not bother Quakers since they did not wish to belong to the church in the first place. This chapter also considers the intersection between ecclesiastical and secular jurisdictions in relation to excommunication, the varied use of the penalty and the way in which Quakers became imprisoned because of it.

The Conclusion draws together and reflects upon the research and the resulting arguments.

Chapter One

RESEARCH STRATEGY AND METHODOLOGY

1. General Introduction

The introductory chapter explained that this thesis addresses the lack of localised studies concerning the law and Quakers. This chapter describes the research strategy and methodology that has been chosen in order to pursue that object. This is intended as an empirical study.

I explain the selection of the 'geographical' scope, the time scale, the areas of law to be studied and the range of source material. Careful consideration has been given to the respective merits or otherwise of a quantitative methodology for the purpose of this thesis. As the research progressed, this was modified to a mixed methodology. These matters are each explained in more detail below.

2. Research Strategy

Introduction

The purpose of the research is to look objectively at the specific experiences of persecution suffered by the Quakers within a defined geographic area. The intent, though, is not merely to record the fact of such persecution, since it is already recorded in contemporary Quaker and non-Quaker sources. Rather, the object is to go further and to investigate in greater detail the legal basis upon which such persecutions were based and to consider critically the actual operation of the secular and ecclesiastical legal systems in this period. Thus, local studies, carefully observed, will offer insights into the broader relations between Quakers nationally as non-conformists and the legal system.

The relationship between law as an emanation of the state and the Quakers as proponents of non-conformist political and theological beliefs is clearly complex. The relationship cannot be adequately understood merely by the recording of sufferings, since this fails to identify the nature of the alleged, perceived or

experienced persecution with sufficient specificity. Nor do records of sufferings alone provide sufficient context to answer the important question of whether the Quakers were the subject of clear and specific malice against them as a group or whether their own beliefs meant that they fell afoul of the normal processes of the law that were similarly applied against those we might call 'ordinary transgressors'. Persecution is a deliberate act. The question of identifying the precise nature of the alleged, perceived, or experienced persecution has therefore to be confronted.

There is close analysis of the predominant types of secular and ecclesiastical proceedings. This line of enquiry is segmented, for the purpose of analysis, into considering the substantive law that gave rise to a particular prosecution or suit, and instances of its application to Quakers in the local context. This is reflected in the structure of the following chapters. Thus, both 'internal' and 'external' law research methods are utilised.¹³⁷

Timescale

The period, 1660-1685, mirrors Horle's work¹³⁸ and corresponds precisely to the accession of Charles II until his death. The early Restoration years of 1660-1685 were formative in relation to the power of parliament, the constitutional position of the monarchy and the role of the Anglican church. It was, as indicated in the introduction, a time of intense political and religious enmity. The period under examination fell between the Cromwellian era, when there was a degree of acceptance of alternative forms of Christian religious worship, and the burgeoning of religious toleration that followed Charles' reign. It saw the introduction of new, and the re-implementation of existing legislation that was adverse to dissenters, especially Quakers. Consequently, the operation of the law at this time so far as Quakers were concerned merits serious consideration.

¹³⁷ David Ibbetson, *Historical Research in the Law* (Oxford Handbooks Online 2012).

¹³⁸ Craig Horle, *Quakers and the English Legal System, 1660-1685* (University of Pennsylvania Press 1988).

Between 1660 and 1685, there were fluctuations in the legal treatment of dissenters in general and Quakers in particular, the reasons for which are conventionally attributed to the politically motivated plots against the newly restored monarchy, vacillation in Charles II's policy, parliamentary politics and episcopal influences. One aim is to trace how such fluctuations manifested themselves in practice and consider the effect of the Quakers' own behaviour and attitudes upon the legal processes during this time.

Quakers debate their own development over this period, some arguing that they changed profoundly from the early 1660s, as they coped with persecution, and as their internal discipline developed.¹³⁹ As I have indicated in the introduction, I believe that their 'core' ideas remained the same.

Geographical Scope

It is apparent that the state in the mid-Stuart period was not very centralised and practices both in relation to secular and ecclesiastical proceedings varied according to geographic region. Judges were allowed to exercise some discretion and there was a heavy reliance upon local magistrates and local officials such as churchwardens, and constables for law enforcement. Accounts, such as Reay's,¹⁴⁰ which purport to offer a national perspective often fail to adequately explain, or account for, regional variations and sometimes attempt to draw national conclusions bolstered by some of the more extreme local examples, usually from Besse.¹⁴¹ In addition, the broad historical accounts have generally eschewed the close legal analysis necessary to explain what was indeed at issue in specific disputes. This thesis then addresses that deficiency by careful reconstruction of the proceedings against Quakers within a confined time and space. As will be seen, the resulting exposition both fleshes out and offers substance to the picture offered at national level but also challenges some of the assumptions made within the accepted historical account.

¹³⁹ See for example, Rosemary Moore, *The Light in their Consciousness, The Early Quakers in Britain, 1646-1666* (University of Pennsylvania Press 2000) 214.

¹⁴⁰ Barry Reay 'The Authorities and Early Restoration Quakerism' [1983] 34 *Journal of Ecclesiastical History* 69-84.

¹⁴¹ Joseph Besse, *A Collection of the Sufferings of the People Called Quakers* (London 1753).

The historical North West comprised Westmoreland, Cumberland, North Lancashire, the western edge of North Yorkshire and the Isle of Man. The North West was susceptible to anti-clericalism. Although it was traditionally royalist, and also a Catholic stronghold, religious dissent was virulent and many of the sects described previously fructified there. As noted in the introduction, this area was both the cradle and the initial headquarters of Quakerism.

*O thou North of England who are accounted as desolate and barren, and reckoned the least of the Nations, yet out of thee did the branch spring, and the Star arise which gives light unto all Regions round about... and out of thee terror of the Lord proceeded, which makes the earth tremble and be removed; out of thee Kings, Princes and Prophets did come forth in the name and power of the Lord,*¹⁴²

wrote the Quaker, Edward Burroughs, of the growth of Quakerism, in 1655.

The region had a high proportion of royalists desirous of the restoration of their former wealth and status following their travails in the Civil War. A number of them were vehemently opposed to Quakers. Some members of the gentry, such as Gervase Benson and Judge Thomas Fell became their protectors, others were keen users of the law to quash them.

This region is therefore rich in material appertaining to Quakers' collective, as well as individual, experience of the law. However, this is a large area covering several counties. It has been necessary to apply boundaries for obvious practical reasons, and given the fact that there are limited online resources, and primary sources are dispersed (This is explained more fully under Section Six below.)¹⁴³

The focus is upon Westmoreland, Cumberland and North Lancashire, where there was a concentration of Quakers, their base at Swarthmoor Hall in Ulverston, and a large cohort of hostile gentry, tithe owners and clergy. It was the *locus operandi* of Daniel Fleming, whose papers are especially revealing. The

¹⁴² a reference to Matthew 2, 6-10.

¹⁴³ Consequently, I have not specifically explored the Isle of Man, Yorkshire or the rest of Lancashire. I also had a concern that seventeenth-century Manx law may have differed in some respects which I did not have time to explore.

area reflected intense religious and political rancour.¹⁴⁴ Carlisle had been a Royalist stronghold during the Civil War. Other areas, such as Cockermouth had longstanding Puritan leanings.

This part of the North of England in the seventeenth century was wild, remote and a long way from the political seat of government. To this extent, it is of interest with regard to exploring connections and communications between the centre and the localities. It 'was sparsely populated by yeomen who tended to farm their own land between the fells. Drovers' roads serving the cattle trade connected settlements. Most people worked on farms. Townships or settlements 'functioned collectively' but 'individualism flourished.'¹⁴⁵ There were 'poor communications, a backward economy and a totally inadequate structure for ecclesiastical administration.'¹⁴⁶

So far as ecclesiastical jurisdiction is concerned, the upper region came under the Diocese of Carlisle, but the bulk of this area fell within the Diocese of Chester. Accordingly, in relation to ecclesiastical law, it has been necessary to consider sources relating to the Chester diocese. This has led to use of their related secular sources, which have proved to be a useful comparator. This vast ecclesiastical territory was managed more locally to the main area of focus through the Archdeaconry of Richmond. In addition, the respective dioceses came under the Archbishopric of York within the Northern Province and so the route for ecclesiastical appeals was to York. To the limited extent that reference is made to ecclesiastical appeals, this, therefore, also comes within the geographical scope.

¹⁴⁴ Michael Mullet, 'Politics and Religion in Restoration Cockermouth, Cumberland and Westmoreland' [2013] XXIV Antiquarian and Archaeological Society, Tract Series 19.

¹⁴⁵ Arthur Kincaid, *The Cradle of Quakerism: Exploring Quaker Roots in North West England*, (Quaker Books 2011) 6.

¹⁴⁶ Nicholas Morgan, *Lancashire Quakers and the Establishment, 1660-1730*, (Ryburn Academic Publishing 1993) 12.

3. Methodology

Database

In seeking to chart all the types of proceedings used against Quakers and their respective prevalence in the region, I have compiled a database, the primary source for which is Joseph Besse's Collection of Sufferings. It was populated at the outset using with all of the entries from across the counties that comprise the geographical unit, namely Cheshire (from the 2008 facsimile edition) and Lancashire, Cumberland and Westmoreland (from the 2000 edition).¹⁴⁷ The original plan was to add all further proceedings that were discovered from other sources during the course of the research, with the ultimate aim of providing a comprehensive set of data, and producing a variety of quantitative reports that would provide a statistical base for analysis in conjunction with local case studies. As the research progressed, I found that the combination of secular and ecclesiastical proceedings against Quakers over the period as a whole were so extensive that a great deal of activity occurred outside of Besse's account.

Legal proceedings are recorded by diverse means and in diverse places. For example, periodically visitation records¹⁴⁸ included Quakers, although often simply by listing their names according to parish. Similarly, Quakers names are recorded in the lists of recusants.¹⁴⁹ Such lists run to hundreds of names locally. Recusancy rolls are held in the National Archive. Standard visitation records for the Westmoreland and Cumberland parishes are not held in the Cumbria record office with local papers concerning, for example, tithe and conventicles proceedings or with the Chester Diocesan records. Instead, they are found in the Lancashire record office which has inherited them as the western repository for the Archdeaconry of Richmond. On the other hand, Archbishopric visitation records are kept in the Borthwick Institute in York.¹⁵⁰

¹⁴⁷ I expound on the reason for relying upon Besse as a source below.

¹⁴⁸ For a discussion about visitations involving Quakers see Chapter Two, The Re-establishment of the Church of England.

¹⁴⁹ The recusancy records in question were kept during the 1670s and 1680s.

¹⁵⁰ These visitation records are undergoing a digitisation project.

The limitations of cataloguing mean that it is difficult to separate legal proceedings concerning Quakers from legal proceedings generally. An example is the Borthwick Institute's appeal cause papers which are listed according to the types of appellate proceeding, eg tithes, and by personal name, but without referencing Quakers at all.¹⁵¹ Similarly, some local magistrates' papers contain many more references to proceedings against Quakers than appears from the archive catalogue description.

The accessibility and availability of source materials is problematic. The lack of centralisation is reflected in inconsistent record retention. Few records (the Borthwick appeal cause papers being one helpful exception) are available online.

Given the fragmentary nature of the record-keeping, and the fact that standard archival cataloguing is not designed to facilitate legal history research of this nature, I concluded that it was difficult to be confident that all relevant proceedings have been found. This militated against attempting a comprehensive quantitative study and, so far as the overall purpose of this research is concerned, it would be unwieldy. There is, clearly, a role for a quantitative study but the project should be dedicated to the compilation of all legal procedures.

Some studies have opted to chart particular types of prosecution. David Butler¹⁵² quantified, and illustrated in graph form according to county, all proceedings nationally concerning a value above £10, taken from Besse, in order to show regional fluctuations. He acknowledged 'a high degree of selection is necessary' because of the huge potential range of proceedings. He specifically excludes tithes, his rationale being that tithes were individual causes unrelated to suppression.¹⁵³

¹⁵¹ There is another side to the issue of Ecclesiastical appeals involving Quakers which I discuss in Chapter Eight.

¹⁵² David M. Butler, 'Friends' Sufferings 1650 to 1688: A Comparative Summary' [1988] 55/6 *Journal of Friends Historical Society* 180-184.

¹⁵³ *Ibid* 182. I discuss the nature of tithe proceedings in Chapter Seven.

On the tithe front, and pertinent to this work, is Morgan's table¹⁵⁴ for the Lancashire region showing the numbers of tithe cases per Quaker meeting (Cartmel, Lancaster, Bickerstaff and so forth), the numbers of tithe owners per meeting, identified as impropiators, clergy, tithe-farmers and unknowns, taken from LQMS,¹⁵⁵ vol.1, 1654-1700. This provides a total of 509 cases over the whole period, and an interesting breakdown of complainants whereby impropiators and (tithe) farmers outnumber clergy. However, the figures alone invite more questions than they answer; to be meaningful, the table must be read alongside his chapter *Distraint and Discipline: Lancashire Tithe Sufferings 1660-1740*.¹⁵⁶ This illustrates the difficulty of relying solely on statistics to which I refer below. Further, whilst this table and the shorter ones contained in his chapter are based on sound evidence, they do not neatly fit the timescale or geographical scope of this project so as to be incorporated into this thesis without separate analysis.

This research has identified more prosecutions, especially ecclesiastical and summary proceedings in the North West, than the table that is contained in Horle's appendices.¹⁵⁷

Such tables are indicative but the omission of significant categories of proceedings such as tithes and petty proceedings does not particularly help in reaching an understanding of the nature and scale of the issue. I have taken a different approach, because all legal proceedings, of whatever type, that arose due to Quakers' beliefs, make manifest a tension between the law and a significant sector of society at that time.

Use of Mixed Methodology

I have used the data from Besse as a foundation, in combination with local sources, to facilitate the examination of the substantive law and the practical operation of legal processes and procedures. This method yields more detailed

¹⁵⁴ Morgan (n146) 289.

¹⁵⁵ Records of the Lancashire Quaker Meeting for Suffering.

¹⁵⁶ Morgan (n146) 194-243.

¹⁵⁷ Horle (n138) 280-283.

information regarding the experience of the law, its operation, the influences that affected these factors and the individuals involved. It provides evidence of typical experience of the Quaker community in the region as well as their relationships with those who brought proceedings against them. As such, this mixed quantitative and qualitative method is more consistent with the overall purpose of the research.

Whilst it does not purport to contain every single case, the database is, nonetheless, very valuable. It provides a context for the local studies, a benchmark for gauging the overall scale of legal proceedings, and a tool for chronological analysis. Besse's entries are contained in three Tables: Proceedings, Defendants and Prosecutors. The Proceedings Table was originally intended to be a forensic tool. It contains the fields: Month (where known), Year, Defendant, Prosecutor, Reason, Court, Sanction, Imprisonment, Appeal and Notes. The field 'Reason' refers to the legal proceedings, using Besse's varied descriptions. These are subdivided into i) "secular": Tithes, Oaths, Meetings, Non-Conformity, Unspecified, Disturbing the Peace, Refusing Surety for Good Behaviour, Meetings and Oaths, Declaring Truth in Marketplace, and ii) "ecclesiastical": Tithes, Easter Offerings, Absence from National Worship Interrupting Church Service, 3 James, Reproving a Priest, Marriage Fees, Repairs to chapel, Steeple House Rates, Illegitimate children, Acts against Popish recusants, Church Dues, Communicant Money, Not receiving Sacrament, Priest's Wages, Visitation, Prescription Money, Non- Appearance. There are 1,744 entries in total. Clusters of certain proceedings, unsurprisingly, coincide with the external political events. On the other hand, there is less obvious concurrence of other proceedings, such as tithes, which invites further analysis. The Defendants Table contains the names of 1,036 Quakers who suffered legal proceedings (although this figure should be used with caution because some names are similar to others and may have been duplicated). The Fields comprise: Full Name, Male or Female, Residence, Prosecutor, and Parish (where known) and Notes. The Prosecutors Table contains 104 named prosecutors although it should be noted that a large number of proceedings are entered under Unknown prosecutor. The Fields are: Full Name, Male or Female, Location, Parish, Status,

Prosecuting Capacity and Notes. It is possible to cross-refer the number of defendants who were prosecuted by particular Prosecutors. However, this Table is very limited in content because Besse does not always record the details.

4. Chronology

The material in this thesis is not organised chronologically because it deals with the law rather than the history. However, a simple timeline is appended. This is less a forensic tool than an aide to understanding the major events of the said twenty-five years in their respective sequences in order to appreciate the political climate and the legal impact of such events upon Quakers.

5. Legal Parameters of the Project

Quakers encountered the whole gamut of civil, criminal and ecclesiastical law. This is not an exhaustive study of one particular area of law or a survey of every possible legal issue. Instead, it is an attempt to look at a certain range of legal processes so as to inform a picture of regional activity.

The vantage point is the quotation from Besse, set out in the introductory chapter, in which he iterated the principles whereby Quakers were '*rendered obnoxious to the penalties of the law.*' This directs the focus, so far as secular law is concerned, predominantly towards the legislation concerning conventicles, or assembling together, with particular emphasis upon penalties of fines, distraint, and imprisonment.¹⁵⁸ The applicable ecclesiastical law related mainly to tithes, church repairs, clergy wages, and Easter-offerings. I also give detailed consideration to the penalties of praemunire and excommunication, for reasons that will become apparent in the dedicated chapters. There was both secular and ecclesiastical law relating to oaths with different penalties according to the respective jurisdiction. Legislation on church attendance, again, straddled both.

The selection of legal processes to be studied is justified by the fact that, as shown above, the preponderance of local cases of sufferings that have been

¹⁵⁸ So, for example, marriage, testamentary law, trade law and so forth are not within scope.

entered in the database from Besse correspond with the ‘*principle points*’ whereby Quakers encountered legal penalties.

Another limitation to be noted concerns the penalty of transportation which could be imposed through the sections of the Conventicles Acts.¹⁵⁹ However, to be consistent with the approach taken in this study, research into transportation would involve archival visits far and away. It must be said that Besse does not report transportation as a major feature in this region, although he provides an example of an attempt at transportation from the Isle of Man.¹⁶⁰ The Lord Chancellor, and Sir Philip Musgrove, an enemy of Quakers in Westmoreland, were in favour of it. He wrote to Sir John Lowther on 24th December 1664:

I do give you thanks for the account you are pleased to give me of your proceedings against the Quakers concerning which matter I did... speak with my Lord Chancellor who told me ... that from all parts of England they heard of their insolent behaviour and did desire as quick a course might be taken for suppressing of them by imprisonment and transportation as the law will allow.

There are conflicting views in the literature as to the extent that this penalty was imposed in the first instance, and, if imposed, ultimately carried out, with indications that sea captains (such as the one involved in the Manx case) refused to transport Quakers on occasion. It has, rather regrettably, been excluded as too large in scope for this particular work.

6. The Selection and Limitations of Primary Sources

Introduction

The choice of sources is designed to reveal the substantive law at issue, as well as its procedures, not least because the Quakers took issue with both. The aim is also to ascertain the attitudes of the various local officers towards the Quakers in the prevailing political, social, legal and religious contexts.

¹⁵⁹ The Conventicles Acts 1664 and 1670 are detailed in Chapter Three.

¹⁶⁰ Joseph Besse, *A Collection of the Sufferings of the People Called Quakers* (Sessions Trust 2000) Isle of Man 271-273.

Joseph Besse's "Records of Sufferings."¹⁶¹

I have used Besse's records as a framework for analysis of the law relating to Quakers. Joseph Besse¹⁶² was a writing-master who was requested under the terms of the Society of Friends' 1727 Yearly Meeting to collect and digest the sufferings and imprisonment of Friends. These had been recorded, from a very early stage, locally, then transcribed, firstly, for their Yearly Meetings and, secondly, into the *Great Book of Sufferings*, which was compiled at the instigation of the central Quaker organisation during the Restoration in order to record and counter persecution.

The first volume of Besse's work was printed in 1733 as an *Abstract of the Sufferings*. The second and final folio volume was published in 1753. The full title of the work is:

A collection of the sufferings of the people called Quakers, for the testimony of a good conscience, from the time of their first being distinguished by that name in the year 1650, to the time of the Act, commonly called the Act of Toleration, granted to Protestant dissenters in the first year of King William the third and Queen Mary, in the year 1689. Taken from original records and other authentic accounts, by Joseph Besse.

Besse's compilation of sufferings remains the foundational primary source because it provides the most comprehensive and accessible record of legal proceedings involving Quakers. It records, chronologically and by county, the name of every Quaker who was recorded by their local meeting for sufferings, as well as the nature of the proceedings, the date and the particular outcome for them. Since records of many ordinary proceedings do not specifically distinguish the defendants as Quakers it helps redress the difficulty referred to above in facilitating cross-reference with other records of legal proceedings.

¹⁶¹ Besse (Sessions Trust 2000 and 2008).

¹⁶² This section is taken from David M. Butler, 'Friends' Sufferings 1650 to 1688: A Comparative Summary' [1988] 55/6 *Journal of Friends Historical Society* 180-184. For a fuller account, see Norman Penney 'The story of a great literary venture' [1926] 23 *JFHS* 1-11.

I do not challenge the accuracy and authenticity of the records of sufferings or Besse's account thereof per se (many of them are supported by Quaker and non-Quaker sources in any event). However, he starts from the premise that those who suffered were worthy martyrs and that they were persecuted for conscience sake. I have found a number of instances of the counter-view regarding the problems caused by their flouting the law as well as more information about the context of certain events that led to particular proceedings against them. The limitations, inferences and possible bias of Besse are identified and considered more specifically during the course of the chapters in which his record is compared to other contemporary accounts.

I have not set out to recite every compelling instance of cruelty, harassment, impoverishment, and custodial deaths in these materials. The details that have been extracted are those pertaining to the legal processes through which such sufferings came about: it is not necessary to analyse every single case for this purpose.

Besse appears to cite proceedings in which Quakers suffered the more severe hardships and penalties and it is avowedly an abstract of the material in the Great Book of Sufferings. Further, and hypothesising, it may have been the case that the matters which were referred to in the reports of meetings for sufferings comprised those thought worthy of report because of their harshness, or as examples of persecution or bias. This would be consistent with Peters' statement¹⁶³ that the purpose of recording sufferings was to 'rehearse the key issues of state interference in religion.' Support for this hypothesis is also found in a comparison between Besse and other sources. One such example is in Archbishop Sterne's 1669 second visitation records which contain the names of all Quakers in about 18 Westmoreland parishes. No such proceedings appear in Besse. Summary proceedings could follow visitations. If a sanction was imposed, it may not have been regarded as out of the ordinary so as to merit entry in the records of sufferings. The implications for this project are that whilst the entries in Besse are a very good indication of the range, nature and number of legal

¹⁶³ Kate Peters, *Print Culture and Early Quakers* (Cambridge University Press 2005) 204.

proceedings, they are not sufficiently comprehensive or consistent to provide either reliable statistical information, or the complete picture that includes more petty legal encounters.

Widening the Range of Primary Sources

Other works that provide a countrywide account acknowledge that the lack of records or specific local analysis has left many aspects in obscurity. In order to pursue this, I have sourced actual examples of local legal proceedings. However, it is difficult to trace clear linear progression through all the stages of a given set of proceedings against an individual, especially since this era predated formal case reporting and documentation. Indeed, a contemporary vexed issue was the lack of formal written criminal indictments. However, ecclesiastical cause papers, informations, witnesses' depositions and interrogatories, can be found. I have cited these in a number of proceedings but they are frequently preserved in isolation and so cross-reference to other sources is needed to contextualise them. Formal written decisions were rare, although it appears these were sometimes required, such as those of JPs in the event of an appeal under the Conventicles Act 1670.¹⁶⁴ It was common for cases under both jurisdictions to be dealt with summarily. In many instances, the documentary trail between early stage proceedings and the imposition of later, more, severe sanctions cannot be traced. I have, occasionally, been able to make the leap across this gap, by the cross-referencing of sources, as is apparent in the respective chapters. One of the main features that this has highlighted is how trivial, ecclesiastical offences could result in state imprisonment.

To address the fragmentary nature of the materials, and the many gaps indicated above, I have compared a wide range of sources, both local and national, which have not been previously been subjected to similar analysis. Recourse has been made mainly to archive holdings in local record offices (Manchester, Chester, Preston and Cumbria), the National Archive, Lambeth Palace, the Borthwick Institute and the Quaker archive in London. Some corroborative material has

¹⁶⁴ as detailed in Chapter Three.

been found in the Bodleian Library, Dr Williams Library of Dissenting Literature and Middle Temple Library. I have also relied upon selected cases from Quakers' own accounts to reveal the experience of these proceedings.

The use of less-visited local sources in particular provides a more rounded perspective to Quaker sources. It enables a more detailed reconstruction of circumstances, conflicts and proceedings leading to those legal penalties broadly labelled as evidence of persecution. For contemporary accounts of proceedings, I have found unexplored papers from local magistrates, to be particularly informative.

Calendar of State Papers ¹⁶⁵

Both Quaker and non-Quaker historians utilise the Calendar of State Papers for this period. However, the entries can be interpreted in different ways, according to perspective. I do not draw definitive conclusions from these but have cited specific sections, especially regarding the early period, for their value in providing a national context to the local treatment of Quakers, as well as illustrating the nature of communication between the local operatives and central government.

Materials on Seventeenth Century Law

Introduction

Where possible I have used contemporary texts on ecclesiastical and secular law. For ecclesiastical law, in general, I have preferred Dr Richard Burn¹⁶⁶ to the better-known standard work on ecclesiastical law by Sir Robert Phillimore¹⁶⁷ because the latter, writing in the nineteenth century, clearly refers to developments and decisions of the law that post-date the period in question. I cite Burn in relation to tithes, oaths and excommunication. I have also cited

¹⁶⁵ *Calendar of State Papers Domestic: Charles II, 1660-1685* Mary Anne Everett Green and Others (eds) (Longman, Green, Longman and Roberts 1860-1939), and, from the Quaker perspective, Penney, N. (Ed) *Extracts from State Papers relating to Friends 1652-1672* (Headley Brothers 1913).

¹⁶⁶ Richard Burn, *A System of Ecclesiastical Law* (London 1743).

¹⁶⁷ Robert Phillimore, *The Ecclesiastical Law of the Church of England*, Vols I and II (Sweet and Maxwell 1895).

Degge¹⁶⁸ on tithes for an ecclesiastical law perspective and Selden¹⁶⁹ for the common law perspective.¹⁷⁰ *The Reportorium canonicum, or An abridgement of the ecclesiastical laws of this realm* by John Godolphin, published in 1678, and *The practice of the spiritual or ecclesiastical courts* by Henry Consett, published in 1685, provide comprehensive contemporary expositions of ecclesiastical law. Burn's slightly later edition is consistent with them. I have relied predominantly upon Burn's succinct account for the purpose of this thesis in the sense that the operation of the ecclesiastical courts and specifics of the laws in question are described more in order to place the Quakers' experience into context, than to provide a detailed exposition of ecclesiastical law. However, Godolphin and Consett augment this account. Accordingly, I have provided the relevant citations in relation to ecclesiastical practice in Chapter Two, tithes in Chapter Six and excommunication in Chapter Seven. In general (as is indicated by the title) Consett is especially helpful on procedure, and Godolphin contains thorough case law references.

Spurr notes that most of the church courts of Restoration England remain unstudied, and that generalisations are fragile.¹⁷¹ This project has benefited from B. Till's¹⁷² detailed but unpublished manuscript treatment of the restoration of ecclesiastical jurisdiction in the Northern Province. My chapter dealing with the re-establishment of the ecclesiastical courts relies extensively upon this, and upon the abridged published version.¹⁷³

¹⁶⁸ Simon Degge, *The Parson's Counsellor: with the law of tithes and tithing* (London 1676).

¹⁶⁹ John Selden, *The History of Tithes That is the Practice of Payment of Them, the Positive Laws Made for Them, The Opinions Touching the Right of Them* (First published 1618. Early English Books Online Print Editions 2001).

¹⁷⁰ I am grateful to Professor Andrew Lewis for directing me to Selden and Degge, and to Professor Norman Doe for drawing my attention to Godolphin and Consett.

¹⁷¹ John Spurr, *The Restoration Church of England 1646-1689* (Yale University Press 1991) 209.

¹⁷² B D Till, *The Administrative System of the Ecclesiastical Courts in the Diocese and Province of York. Part III. 1660-1883. A Study in Decline* (Leverhulme Research Scheme 1963). Unpublished manuscript, Borthwick Institute.

¹⁷³ B D Till, *The Church Courts 1660-1720: the revival of procedure* (Borthwick Paper no.109 2006).

It is less easy to find comprehensive texts on mid-seventeenth century secular law. I have obtained information from dedicated works, such as the *Book of Oaths*¹⁷⁴ and various tracts as set out below.

Seventeenth-Century Tracts

The starting point of the methodology is not secondary commentary but the primary law and sources relating to that. In fact, law often lay behind tracts and pamphlets. In general, the latter are more useful from a purely historical perspective than for legal analysis. Of course, many of these works were polemic or propagandist but, as such, they comprise an invaluable representation of contemporary concerns. Some for example, the satirical discourse between a burgher and a bishop regarding the political use of excommunication,¹⁷⁵ illustrate the nature of public criticism of legal processes. This is important because of the censorship that was re-introduced in the Restoration, and these largely anonymous tracts were printed, published and disseminated at some risk to all of those involved.

There is a huge range of such documents, and, it is not intended, in the main, to rely on them as authorities on the law, except where they provide concrete, substantive information. For example, *The Case and Cure of Persons Excommunicated*¹⁷⁶ provides details of the substantive law and advice on the procedural law in relation to excommunication. They often fulfil a role in terms of evidencing, for example, legal processes which were either in operation and were criticised, or were forgotten and recommended for use.

¹⁷⁴ R Garnett, *The Book of Oaths and the Several Forms Thereof, Both Ancient and Modern Faithfully Collected out of Sundry Authentic Books and Records, not heretofore extant.* (London 1689).

¹⁷⁵ Anon, *EXCOMMUNICATION EXCOMMUNICATED: OR LEGAL EVIDENCE That the Ecclesiastical Courts Have no Power to Excommunicate any person whatsoever for not coming to his PARISH-CHURCH in a DIALOGUE BETWEEN A DOCTOR of both LAWS, AND A Substantial Burgher of TAUNTON-DEAN (LONDON 1680)* (Tracts 575 Quaker Archive).

¹⁷⁶ Anon, *The Case and Cure of Persons Excommunicated according to the present Law of England in Two Parts,* (London 1682) (7/18 Quaker Archive).

***The Quaker Book of Cases*¹⁷⁷**

The introductory chapter refers to the Book of Cases, which was instituted in 1676 by the Society of Friends' Yearly Meeting in London who decided to seek legal opinions on the merits of the legal processes used against them. Volume 1, which covers the period in question (and the reigns of James II and William and Mary) is useful as a primary archival source regarding their contribution to the political and legal process both nationally and locally. While that it is compiled by and for Quakers as victims and antagonists, it nevertheless has an evidential value regarding seventeenth century law and, as such, forms another rich and significant source for this thesis. The relevant contents for this thesis¹⁷⁸ include:

- Their petitions, which constituted appeals directly to the King
- Copies of correspondence between the centre and the regions on legal issues, with advice on how to conduct them
- Formal instructions to counsel and counsel's advice on the interpretation of the law and legal powers in specific instances
- Details of particular cases and decisions, such as on the validity of Quaker marriage

It demonstrates how the London base communicated with the regions and the remote localities, such as the North West, so far as the law was concerned. It graphically shows the generic and specific legal issues pertaining to both secular and legal processes with which the Quaker movement was concerned and which the local study seeks to examine.

Legislation

The Table of Statutes lists the relevant legislation chronologically and includes the short title where possible. Many of the statutes that were enacted during Charles II's reign are well known and commonly referred to in histories of this period. However, there is a body of legislation that I have sourced and identified as having had a direct impact upon the Quakers' experience, which has been

¹⁷⁷ Book of Cases, Vol. I 1661-1695 (YM/MfS/BOC/1 Quaker Archive).

¹⁷⁸ There are separate papers contained therein regarding legal issues in Barbados, St Nevis and similar territories, as well as legal topics outside of the ambit of this research.

considered rarely, if at all. Tudor legislation concerning tithes¹⁷⁹ is one example. I also refer to certain of the acts and ordinances of the Interregnum, which had a bearing that has, by and large, been overlooked. Further, whilst I do not hold myself out as a seventeenth-century lawyer, I have attempted to analyse the actual wording of certain statutes, in order to understand or clarify a particular feature, such as the common reference to treble damages under 2 and 3 Edward VI c. 13. Reference is made in the particular chapters to the relevant sections that are amenable to interpretation.

¹⁷⁹ See Chapter Seven.

Chapter Two

THE RESTORATION OF THE CHURCH OF ENGLAND, ECCLESIASTICAL JURISDICTION, AND QUAKERS

1. General Introduction

As we saw in the introductory chapter, Quakers were fundamentally opposed to the Church of England. However, this did not render them immune to its jurisdiction. Reay, referring to the situation over the whole country, states that *Quakers were called before the ecclesiastical courts in droves*.¹⁸⁰ In order to fully understand Quakers' experience, it is important to appreciate the impact of the re-established courts and their jurisdiction which has generally been skirted over in the literature.

Accordingly, in this chapter, I describe how the ecclesiastical courts were restored at the outset of the Restoration, with reference to the particularities of the Northern Province and its personnel. I also outline the range of ecclesiastical laws, and their respective procedures. Thirdly, this chapter examines the penalties that local Quakers encountered. Finally, the chapter considers ecclesiastical visitations and the effect of their resumption upon the Quakers living in the North West. This aspect of their historical experience has been neglected.

¹⁸⁰ B. Reay, 'The Authorities and Early Restoration Quakerism' [1983] 34 *Journal of Ecclesiastical History* 69-84.

2. The Process of Ecclesiastical Restoration

Introduction

The introductory chapter indicated that Quakers' emergence was seen to represent *execrable irreligion*.¹⁸¹ The curtailment of the excesses of religious freedom, particularly undisciplined preaching, was of paramount importance.

Three enactments in 1640¹⁸² removed the Star Chamber, prevented the clergy from exercising temporal jurisdiction and excluded bishops from the House of Lords. Helmholz states that 'Ecclesiastical jurisdiction was effectively ended by the abolishing of the episcopacy.'¹⁸³ Their respective restoration was, evidently, a priority for the government.

One of Charles II's first Acts, the Act for Confirming and Restoring Ministers 1660¹⁸⁴ became law within five months of his accession to the throne.¹⁸⁵ The clergy's jurisdiction was restored under the Act Restoring Temporal Power of Clergy 1661.¹⁸⁶

The Ecclesiastical Jurisdiction Act 1661¹⁸⁷ claimed not to repeal the earlier Act for Disabling Persons in Holy Orders to Exercise any Temporal Jurisdiction,¹⁸⁸ but provided:

neither the said Act, nor anything contained therein, doth or shall take away any ordinary power of authority from any of the said Archbishops, Bishops ...

It also made that Act subject to the provisos that:

¹⁸¹ Francis Higginson, 'A Brief Relation of The Irreligion of the Northern Quakers' cited in the Introductory Chapter (n119).

¹⁸² 16 Car I c10, 16 Car I c 27, 17 Car I c 11.

¹⁸³ Richard Helmholz, *The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford University Press 2004) (Oxford Scholarship Online) 54.

¹⁸⁴ 12 Car II c 16.

¹⁸⁵ This confirmed in post ministers who held, or obtained, livings during the Interregnum except those who had favoured the regicide, opposed the Restoration and infant baptism, or possessed the livings of sequestered ministers who were still alive.

¹⁸⁶ 13 Car II st 1 c 2.

¹⁸⁷ 13 Car II c 12.

¹⁸⁸ 16 Car I c 1 27.

- i. the Court of High Commission was not restored
- ii. the ex officio oath (and any oath with similar effect¹⁸⁹) was abolished
- iii. the Act should not be construed as giving the ecclesiastical courts

any power or authority to exercise, execute, inflict, or determine any ecclesiastical jurisdiction, censure or correction, which they might not have done before the year of our Lord 1639, nor to abridge or diminish the King's Majesties Supremacy in Ecclesiastical matters...or to confirm the Canons made in the year 1640.

Seaward¹⁹⁰ shows the third proviso was a Presbyterian measure to limit episcopal power. This reflected the intense concerns at the early Restoration, especially the incorporation of Presbyterians and Catholics into the new regime. The statement excluding the 1640 canon laws was intended to underline the departure from Archbishop Laud. The 1640 canons had formed one of the main grievances presented to Charles I, in so far as they extended beyond internal ecclesiastical matters to royal power and the establishment of the Church of England.¹⁹¹

All religious denominations were involved in the negotiations that led to this Act, as they were with the Act of Uniformity 1662¹⁹² which followed. Quakers and Anabaptists petitioned the House of Lords regarding religious toleration in the summer of 1661 but, 'at the same time as the sects were making appeals to the Lords, the commons were preparing legislation to suppress them.'¹⁹³

Bishops were keen to regain and assert their authority in the House of Lords. This affected the final outcomes of the committees' draft bills that went up to the Lords for the major acts on Uniformity and Conventicles.¹⁹⁴ The bishops'

¹⁸⁹ ie which may require anyone to confess themselves to any criminal matter.

¹⁹⁰ Paul Seaward, *The Cavalier Parliament and the Reconstruction of the Old Regime, 1661-1667* (Cambridge University Press 1989) 168.

¹⁹¹ B D Till, *The Administrative System of the Ecclesiastical Courts in the Diocese and Province of York* (Unpublished Manuscript, 1963. Borthwick Institute, York) 9.

¹⁹² 14 Car II c 4.

¹⁹³ Seaward (n190)171.

¹⁹⁴ Seaward (n190) 162-193 traces the passage of the various bills.

insistence upon a precise Anglican conformity orientated the drafting of the Bill of Uniformity away from moderation. Seaward notes the drafting committee's original brief was to use the most Protestant Book of Common Prayer that had been annexed to the Act of Uniformity 1552,¹⁹⁵ but the Book could not be found! Accordingly, the 1604 Book of Common Prayer, which was approved by Anglicans, was substituted.¹⁹⁶

Bosher contends that, 'by May 1661, the re-establishment of the Church of England was virtually complete.'¹⁹⁷ Whiteman's view (based upon her study of the dioceses of Exeter, Salisbury, Lincoln and Oxford) is that episcopal administration and full re-establishment in most parishes took until 1663.¹⁹⁸ Nonetheless, there was a fairly swift re-instatement of both personnel and the ecclesiastical court system. According to Spurr, there was 'a spontaneous recovery in the counties and cathedral cities, and the cautious proceedings of politicians centrally allowed a vacuum in the localities which the clergy rushed to fill.'¹⁹⁹ It was necessary to fill the eighteen nationwide vacant sees by canonical election. This first required the re-establishment of cathedral chapters which was 'determined by demand from applicants rather than central policy.'²⁰⁰ Seaward points out that there was no clear ecclesiastical policy.²⁰¹

However, once absolute conformity with the Church of England was determined by the Act of Uniformity 1662, only clergy ordained according to Anglican rites could be appointed.²⁰² Its harshness was such that Clarendon considered suspending the Act, but was dissuaded by Archbishop Sheldon who was

¹⁹⁵ 5 and 6 Edw VI c.1.

¹⁹⁶ Seaward (n190) 166.

¹⁹⁷ R S Bosher, *The Making of the Restoration Settlement: The Influence of the Laudians 1649-1662* (Dacre Press 1951) (as cited in Anne Whiteman 'The Re-establishment of the Church of England, 1660-1663' [1955] 5 Transactions of the Royal Historical Society 111-131.

¹⁹⁸ Anne Whiteman, 'The Re-establishment of the Church of England, 1660-1663' [1955] 5 Transactions of the Royal Historical Society 111.

¹⁹⁹ John Spurr, *The Restoration Church of England, 1646-1689* (Yale University Press 1991) 36.

²⁰⁰ *ibid* 36.

²⁰¹ Seaward (n190) 166.

²⁰² Spurr (n199) 42, defines the Act as a 'product of parliamentary horse-trading rather than theological self-definition.'

concerned about the legality of such a step and that it would *let in a visible confusion upon Church and State*.²⁰³

The Act required, by section 4, that every parson, vicar and the wider category of 'other minister whatsoever' should consent to the Book of Common Prayer and to the government of the Church of England by bishops, priests and deacons, effectively ending the previous years' debate about religious freedom and church governance. Section 9 required them to declare against the lawfulness of taking arms against the King. Section 21 removed all incumbents who were not episcopally ordained.

The result of the Act was that any minister who refused to accede lost his living in the Great Ejection of 1662. The position of large numbers of the various types of non-conformists was undetermined. Quaker preachers were only one group so affected. Re-establishment, therefore, further involved the replacement of the estimated 1,700 ejected non-conformists.

The effect, locally, is illustrated by the experience of George Larkham, an independent minister of Cockermouth.²⁰⁴ Following his ejection, Larkham became a fugitive, which was 'paradigmatic of the plight of dissenting ministry nationwide.'²⁰⁵ It is certainly the case, as the records of conventicles in the following two chapters show, that itinerant preachers spoke at Quaker meetings.

Clark says 'the restored regime was to be an alliance of peer and bishop at the centre as it was to be a nexus of squire and parson in the parishes'²⁰⁶ but the Anglican, patrician, hegemony that became established in England was not inevitable.²⁰⁷ The assertion of such hegemony is demonstrated in the sources referred to in this thesis and the said nexus was not benign so far as local non-

²⁰³ Mercurious Publicus 1662 No 35 359-60 quoted in Seaward (n190) 180.

²⁰⁴ Michael M Mullet, 'Politics and Religion in Restoration Cockermouth', [2013] Cumberland and Westmoreland Antiquarian and Archaeological Society, Tract Series.

²⁰⁵ Ibid 23. See also B Nightingale, *The Ejected of 1662 in Cumberland and Westmoreland* (Manchester University Press 1911) for further information on local outcomes.

²⁰⁶ JCD Clark, *English Society 1660-1832* (2nd ed, Cambridge University Press 2000) 62.

²⁰⁷ Ibid 15.

conformists, especially Quakers, were concerned. For instance, in Cockermouth, the local minister, Robert Rickerby, resumed his dispossessed living and was instrumental in reporting conventicles of Quakers to local JPs.²⁰⁸

Mullet describes a 'reign of terror' by West Cumberland royalist gentry against dissenting ministers because of their association with the republic.²⁰⁹ In 1660, Fergusson says Cumberland and Westmoreland were 'ripe for change' and 'The Protectorate was but little loved.'²¹⁰ Royalist Carlisle had been besieged for 42 weeks by parliamentary forces. During the Restoration, the two counties returned predominantly Cavalier Members of Parliament, including George Fletcher and Philip Musgrove, both of whom detested Quakers.

The reverse side of this coin, was that 'as the restored Church of England strengthened its hold in the Cockermouth area, dissent, including the local Society of Friends, acquired a *modus vivendi*, albeit under conditions of repression.'²¹¹ As we shall see throughout this thesis, one manifestation of this *modus vivendi* took the form of resisting the laws to which Quakers objected as not meeting the demands of their internal conscience. This was particularly marked with regard to ecclesiastical law.

Accordingly, the relationships between the episcopacy and the state and between the clergy and the gentry, as well as the ecclesiastical jurisdiction and court structure pertaining to the North West (which will be discussed next) are important contexts through which to understand the nature of ecclesiastical proceedings with which Quakers were involved.

Episcopal Appointments in the North Western Dioceses

The first three Bishops of Chester were ecclesiastical conservatives who had lost their positions during the Commonwealth. Brian Walton was appointed in 1660

²⁰⁸ Mullet (n204) 20.

²⁰⁹ Mullet (n204) 19.

²¹⁰ RS Ferguson, *The MPs of Cumberland and Westmoreland 1660-1867*. (Bell and Daldy London 1871) Chapter 1.

²¹¹ Mullet (n204) 26.

until his death on 29th November 1661. Henry Ferne, a former chaplain to Charles I, died five weeks after his consecration in 1662. George Hall took office between 1662 and 1668. John Wilkins' appointment in 1668 reflected the changed political direction. He favoured toleration and was married to Oliver Cromwell's sister. On his death, in 1672, John Pearson succeeded him until 1686.

There were two Bishops of Carlisle in this period. Richard Sterne, 1660-1664, a royalist and a former chaplain to Archbishop Laud was subsequently appointed as Archbishop of York. Edward Rainbowe became Bishop of Carlisle until 1684. Dr Thomas Smith, who had been a tutor at Queen's College, Oxford, where many of the Cumberland and Westmoreland gentry had studied and with whom he maintained close links,²¹² was the Dean of Carlisle.

The Archbishops of York were: Accepted Frewen (1660-1664); Richard Sterne (1664-1683); and John Dolben (1683-1686).²¹³ The Deans were: Richard Marsh (1660-1663); William Sancroft (1664); Robert Hitch (1664-1677); and Tobias Wickham (1677-1697).²¹⁴

The Archdeacons of Richmond were: Henry Bridgeman (1648-1664); Charles Bridgeman (1664-1678); Henry Dove (1678-1695). The Archdeaconry of Richmond covered Westmoreland, Cumberland and North Lancashire where many Quakers lived. Many of the ecclesiastical proceedings in which they were involved were administered by this archdeaconry.

Bishops' jurisdiction was inherent to their office but they rarely heard cases themselves. The appointment of others, such as archdeacons, in their place was, at times, controversial.

²¹² Howard S Reinmuth Jr., 'A Mysterious Dispute Demystified: Sir George Fletcher vs. the Howards' [1984] *History Journal* 289-308.

²¹³ The respective Archbishops of Canterbury were: William Juxon, who gave the last rites to Charles I (1660-1663); the royalist Gilbert Sheldon (1663-1677); and William Sancroft, who opposed the 1688 Declaration of Indulgence (1677-1690).

²¹⁴ John Le Neve, *Fasti Ecclesiae Anglicanae, 1541-1857* (The Athlone Press 1975).

Ecclesiastical Court Officials in the North Western Dioceses

Introduction

Ecclesiastical courts had different allocations of 'officials'. Church court officials were vested for life. Upon the re-establishment of the courts, the surviving judges and registrars began to operate their courts again. Most ecclesiastical officials were lawyers. They were independent of the bishops. The lawyers who practised in the ecclesiastical courts, whilst educated at universities in common with common lawyers, underwent different training in the procedure of the *jus commune* and were members of Doctors Commons²¹⁵ in London to whom they owed their professional recognition.

Chancellors

Chancellors oversaw the diocesan courts. Dr John Wainwright was the Chancellor of Chester. His name appears on the records of many of the primary sources concerning cases against Quakers. York's chancellor was the senior judge in charge and ranked second in status to the Lord Mayor. In York, the chancellors were: Christopher Stone in 1660 and Thomas Burwell from the Restoration until his death in March 1673. Burwell's name features in several proceedings involving Quakers, and in the appeals that are described in Chapter Eight. Dr Henry Watkinson (a former advocate) followed Dr Burwell. The registrar was George Aislaby.

The commissary, Dr Joseph Craddock exercised ecclesiastical jurisdiction on behalf of the Bishop of Chester in the Archdeaconry of Richmond, throughout the period, although technically, commissaries were officials appointed for a particular task. Till suggests that Craddock was a man of doubtful integrity, citing a clutch of appeals against his decisions from 1678 to 1680 and an implication of falsifying evidence in 1682.²¹⁶ Whilst Craddock's name appears in many of the primary sources that are referred to within this thesis, I have not found any direct evidence of falsification involving Quakers, although he, and his surrogate,

²¹⁵ For more information, see G.D. Squibb, *Doctors Commons* (Oxford University Press 1977).

²¹⁶ Till (n191)24.

Thomas Craddock, were criticised by Quakers in an appeal against excommunication that I describe in Chapter Eight.

It is potentially significant that the same people at high level, whose names recur through the formal court records, prosecuted Quakers. The fact that their names are on formal court documents does not, of course, connote any personal interest in the respective causes. However, high-standing ecclesiastical officials took an interest in Quakers; for instance, Dr Craddock visited George Fox during his imprisonment.²¹⁷

Further to the above insinuation, Section 4 of this chapter cites Archbishop Sheldon's missives to bishops, and their dissemination to church officials, as evidencing the Anglican hierarchy's intense concern with dissent. This is not to imply that they were all necessarily persecutors, but to indicate the fact that they did not have only an introspective interest in the re-establishment of the Church of England.

Advocates, Proctors and Registrars

Advocacy was a prestigious role. Advocates were equal in status to sheriffs. They had to have a degree in civil law. Till says ²¹⁸ they were a 'tight-knit hierarchy, centred on the Close, in York where they were resident.'²¹⁹ Four of the known York advocates were Medley, Walker, Broome and Watkinson. Their first task was to draw and sign a libel. They also provided written opinions. They were paid ten shillings per term until the conclusion of a case.

York retained its statutory number of advocates and proctors upon the Restoration. The corps of eight proctors resumed their duties on 21st August 1660. In York, proctors also acted as registrars who used scribes effectively as apprentice proctors. Deputy registrars or, more commonly, junior clerks, completed the daily Act books. They sat in pairs at various times. Periodically,

²¹⁷ See Chapter Eight on Excommunication.

²¹⁸ BD Till, *The Church Courts 1660-1720: The Revival of Procedure* (Borthwick Paper 109, Borthwick Publications 2006) 10.

²¹⁹ As opposed to the Southern Province which called advocates from Doctors Commons.

during the Restoration period, they were overwhelmed with work and the shortage of advocates meant that they sometimes sat as surrogates to hear cases in which they had been the advocates.²²⁰

Proctors were similar to modern solicitors and had to serve seven years articulated clerkship in relation to ecclesiastical law. They were not required to hold a degree in law but they did have to be notaries public. They prepared court documents and drew up the sentences prepared from the submissions of each side to the judges. They often had their own staff. Proctors were paid five shillings per term but they could charge a terms' fees before a suit commenced and they might continue to be employed after the advocate's role ended, for example, in drawing up formalities such as a significat. As forty days had to pass for that, another term's fees could be charged. Senior proctors probably earned more than junior advocates. York proctors included Henry Squire, whose name appears in tithe proceedings involving Quakers.²²¹ Proctors could, and did (Squire is an example) become advocates.

The Canons of 1603/4²²² contained rules relating to the use of proctors and advocates. Canon 129²²³ prevented proctors from retaining causes without a proxy, which was a written authority to institute or withdraw proceedings. Canon 130 states:

for lessening and abridging the multitude of suits... as also for preventing the complaints of suitors in courts ecclesiastical, who many times are overthrown by the oversight and negligence, or by the ignorance and insufficiency of

²²⁰ Till (n218).

²²¹ as cited in Chapter Seven.

²²² 1603 is the date when these canons were enacted by the Convocation of Canterbury (separately ratified for the province of York by the Northern Convocation in 1606) rather than 1604 when King James agreed to them. See Richard Helmholz 'The Canons of 1603: The Contemporary Understanding' fn 3, 23 in *English Canon Law* (Eds. Norman Doe, Mark Hill, Robert Ombres, University of Wales Press, Cardiff 1998). Hereafter, all references are to the 1603 canons as the effective canons in this period.

²²³ Quotations from canons are from G Bray (ed) *The Anglican Canons 1529-1947*, Church of England Record Society 6 (The Boydell Press 1998). See also H Consett *The Practice of the spiritual or ecclesiastical courts* (London 1685) 29-35 regarding the office of proctors, their functions and the general ecclesiastical law provisions regulating them over and above these particular canons.

proctors, and... for the furtherance and increase of learning and the advancement of the civil and canon law... we will ordain that no proctor exercising in any of them shall entertain any cause whatsoever, and keep and retain the same for two court days, without the counsel and advice of an advocate ...

Canon 131:

No judge in any of the said courts of the archbishop shall admit any libel or any other matter, without the advice of an advocate ...nor shall any proctor conclude any cause depending without the knowledge of the advocate retained ... in the cause.

This was on pain of suspension from practice. Proctors were further constrained by Canon 133, to *refrain loud speech and babbling and behave themselves quietly* with a risk of permanent removal from practice after admonition following a second offence.

Proctors appear to have been allowed to take an oath on behalf of the party *in animam constituentis* except in testamentary and intestacy cases according to Canon 132. This is relevant to the advice that Quakers received to engage a proctor to swear an oath for them.

The use of surrogates (or deputies) also gave rise to complaint. Canon 128 stated:

no chancellor, commissary, archdeacon, official or any other person using ecclesiastical court jurisdiction shall ... substitute in their absence any to keep any court for them, except he be either a grave minister or a graduate, or a licenced public preacher, and a beneficed man near the place where the courts are kept, or a bachelor of law, and is a favourer of true religion, and a man of modest and honest conversation, under pain of suspension...

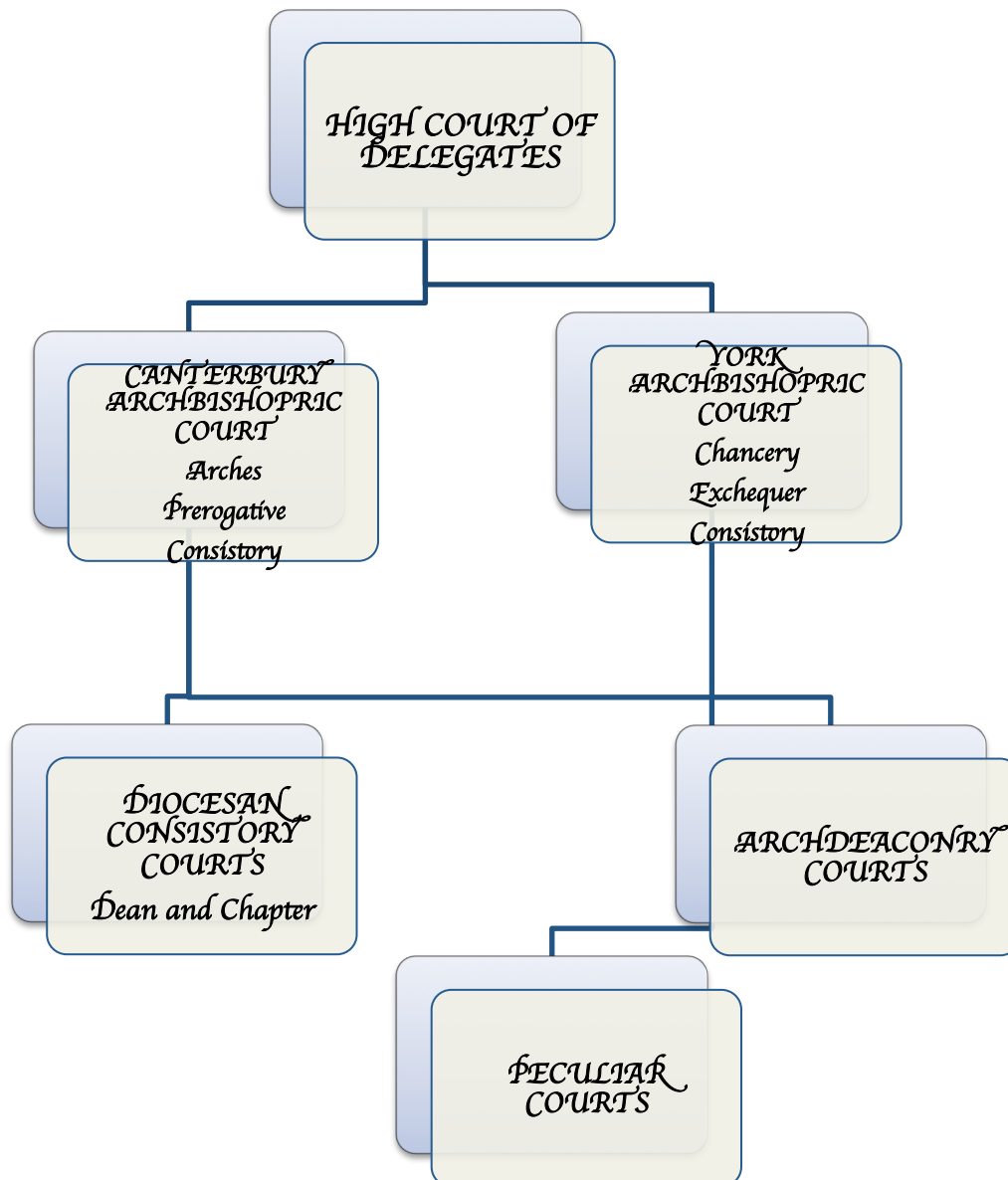
It can be seen that these canons were concerned with regulation and discipline of ecclesiastical legal officials, as opposed to ecclesiastical law. Canon law as the foundation of ecclesiastical jurisdiction is discussed further below.

English Ecclesiastical Court Structure

The machinery of the ecclesiastical courts cranked back into operation as if there had been no break and, except for the above provisos, their jurisdiction was restored virtually unaltered. This was despite the strong calls for reform that had been made prior to, and especially during, the Interregnum.

There were approximately two hundred and fifty ecclesiastical courts throughout the country. There was no uniform pattern but they 'operated within a graded hierarchy with overlapping functions.'²²⁴ A simple hierarchical diagram appears below:

²²⁴ R B Outhwaite, *The Rise and fall of the Ecclesiastical Courts, 1200-1860*, (Cambridge University Press 2000) 2.



The highest court was the High Court of Delegates,²²⁵ which had been established by Henry VIII, under the Act in Prevention of Appeals to Rome 1533.²²⁶ This comprised ecclesiastical and temporal lawyers, and, in special cases, Members of Parliament and peers, and (rarely) bishops. It was appointed by special commission to hear appeals from the two provincial appellate courts, London and York. Provincial courts exercised immediate jurisdiction. Canterbury

²²⁵ For more information, see G I O Duncan, *The High Court of Delegates* (Cambridge University Press 1971).

²²⁶ 24 Hen VIII c.12.

and York each had three separate courts for separate functions. Below these were consistory courts, usually in the cathedral towns, which heard appeals from archdeaconry, commissary, and diocesan courts.

Every diocese had one consistory court and the larger ones had more.²²⁷ Most dioceses had a dean and chapter court concentrating upon parish business and *sede vacantia*. Consistory courts dealt with clerical and lay discipline, upkeep of churches and furniture, defamation,²²⁸ testamentary cases and, importantly for Quakers, tithes.

There were approximately three hundred peculiar courts, some of which dealt with monastic, royal, episcopal or cathedral properties. They could operate as simple 'parish courts' and outside bishops' jurisdiction and they 'varied in how peculiar they were.'²²⁹ In practice, they mainly dealt with small testamentary matters under the local incumbent or rural dean.²³⁰ Rural deaneries made money on granting probate of small estates.

Some counties had several archdeaconries belonging to different dioceses so archdeaconry courts did not necessarily correspond with county boundaries. This lack of rationalisation on a provincial level was a medieval legacy and complicated the question of venue. The Archdeaconry of Richmond came under the Chester diocese. Quakers in the North West were called to courts within the Carlisle diocese and both the Chester and Richmond consistory courts. Richmond had one of the largest jurisdictions in the country in terms of both territory and substance.²³¹ North Western Quakers called to these venues had a long way to travel.

²²⁷ eg Lincoln had four. See Till (n218) 13.

²²⁸ unless this involved criminal activity, in which case, it was dealt with in the common law courts.

²²⁹ Till (n218) 8.

²³⁰ Till (n218) 8.

²³¹ Information courtesy of Professor Andrew Lewis.

The *Barebones Parliament* had, in April 1653, established a commission to deal with testamentary business, but some ecclesiastical courts, including the York Exchequer, had continued to deal with these although this was technically illegal. Till describes the restoration of the York courts as follows. The York Exchequer 'was easy to resurrect and it was in operation, according to its Act book, by 2nd November 1660 with many cases *in media res*.' Although the Exchequer had endured, the York 'Consistory and Chancery courts had completely ceased' but they soon resumed operation. Till records that the York 'Consistory Act book shows that the court sat regularly on Thursdays from April 1661... It was busy with tithes in the Michaelmas Term. There were one hundred new cases comprising sixty-four tithes, twenty-two defamation, ten testamentary, and four matrimonial cases. The first excommunication was on 14th November 1661²³² retrospective to 26th September 1661.'²³³

3. Ecclesiastical Jurisdiction

Ecclesiastical law constituted a substantial part of the general law of the country. However, ecclesiastical jurisdiction formed a distinct system (after the Ordinance of William the Conqueror 1072 separated the ecclesiastical courts from the King's courts). To this extent, I describe ecclesiastical law as separate from the 'secular law' that was administered in the King's courts.

Sir Matthew Hale, the Lord Chief Justice (who favoured toleration and had some sympathy towards Quakers) wrote a contemporary legal historical account of ecclesiastical jurisdiction in *The History of the Common Law*.²³⁴ Hale divided non-statutory law into the common law, which he explains to be 'First, the Law by which Proceedings and Determinations in the King's Ordinary Courts of Justice are directed and guided' and 'Secondly, Those Particular Laws applicable

²³² See also Chapter Eight on excommunication.

²³³ Till (n 218) 2-11.

²³⁴ M Hale *The History of the Common Law of England* (First published 1713, University of Chicago Press 1971).

to particular Subjects, Matters or Courts.’²³⁵ The second category comprised ecclesiastical, admiralty and military courts.

It is noteworthy, in the sources that I cite, that counsel advising Quakers made reference to, and hence they were conversant with, canon law, common law and secular legislation. Similarly, common law and parliamentary legislation were cited in the ecclesiastical courts and in the reports of causes, although they were not necessarily regarded as dominant.²³⁶

Hale described two kinds of ecclesiastical jurisdiction: the first derived from the King’s commission and the second where jurisdiction attaches to offices such as bishops by their election and confirmation. He adds that this has extended, within limits, to archdeacons ‘by usage’, although this extension was controversial. Without legislation of the King’s commission, ecclesiastical processes could not ‘*use any Temporal Punishment or Censure, as fine, imprisonment etc.*’ Particularly important, so far as Quakers was concerned, was that despite their refusal to recognize the Church of England, canon law was a source of law applicable to all citizens, provided ‘it did not violate the laws and customs or the King’s prerogative, following 25 Hen. VIII c.19.’²³⁷ After the Reformation, there was no recognition of external (essentially, papal) jurisdiction, so all ecclesiastical jurisdiction, whether through the courts or attached to offices, derived from the Crown.

Ecclesiastical courts applied canon law which was a collation of scripture, papal decrees, and custom, as well as legislation. Gratian’s *Decretum* which was published in 1140, is regarded as its first major compilation. In England, much of the law that particularly affected dissidents after the Restoration was effected in the antecedent later medieval and Tudor periods. Lawyers in Doctors Commons, such as Lindwood, Swinbourne and Cozens, interpreted canon law and are cited as authorities in contemporary texts on ecclesiastical law, such as Burn, Consett

²³⁵ *ibid* 17.

²³⁶ Helmholz (n183) 32-33.

²³⁷ *Ibid* 5.

and Godolphin.²³⁸

In general, ecclesiastical lawyers believed that, in canon law as well as in the rules of the *jus commune*, were 'principles of sound reason and natural justice.'²³⁹ Gordley²⁴⁰ says that medieval canon jurists were interested in 'the norms that should govern the Church and Christian life' and, as such, they studied both Roman law and scripture, the teachings of bishops, synods, councils, popes, the admonitions of pastors and reflections of scholars and saints²⁴¹ to deal with the legal matters that came within the Christian churches' jurisdiction. This is an important consideration in relation to how canon law was used against its offenders, whether members of the established church or dissenters, in the Restoration. The chapter on excommunication explores this theme in more detail but there had arguably developed a distance between the aims and theory of canon law and its practical operation. It seems to me that this was particularly marked in relation to enforcement. This view is derived from the fact, as the detailed studies will show, Quakers would not accede to ecclesiastical law's conciliatory aims and the impasse resulted in their deemed contumacy. At that point, and particularly when punishment transferred to secular jurisdiction, the final outcome of offenses against ecclesiastical law could be harsh.

Till,²⁴² whose focus was upon the ultimate decline of the York ecclesiastical courts, says the ecclesiastical 'courts were left administering laws which were largely irrelevant', together with 'remnants of Roman Catholic law that had not yet been abolished'. The first in the series of 1603 canons were designed with Catholic recusants in mind. They were not adapted to the impact of the fructification of dissenting opinion and Quakers were affected by their

²³⁸ Richard Burn, *The Ecclesiastical Law* (H Woodfall and W Strachan 1763), Henry Consett, *The practice of the spiritual or ecclesiastical courts* (London 1685), John Godolphin, *Repertorium canonicum, or, An abridgement of the ecclesiastical laws of this realm* (London 1678).

²³⁹ Thomas Bevor, *History of the Feudal and Canon Law* (All Souls College, Oxford, MS.110/2 ff.) 44-5 cited in Helmholz (n183) 5.

²⁴⁰ James Gordley, *The Jurists, a Critical History* (Oxford University Press 2013).

²⁴¹ *ibid* 53.

²⁴² Till (n214) 2.

conservatism. Canon 98, which inhibited ecclesiastical appeals brought by those who did not observe Church of England rites is a good example.²⁴³

Since the 1640 canons had not been confirmed, the one hundred and forty-one canons of 1603 applied. A large proportion of these constituted procedural requirements. Procedural rules followed canon law:

*but not in its full latitude, and only so far as it stands uncorrected, either by contrary Acts of Parliament, or the common law... for there are diverse Canons made in ancient Times, and Decretals of the Popes that never were admitted here, particularly in relation to Tythes; many things being by our Laws privileg'd ... (Timber...Coals etc) where the Canon Law... is silent, the Civil Law is taken as the Director.*²⁴⁴

However, their legal authority was severely contested by parliament, which maintained that the clergy had no power to create offences that might be subject to civil punishments. Judges in Westminster Hall eventually decided that the 1603 canons bound the clergy but not the laity²⁴⁵ since they did not receive parliamentary assent.²⁴⁶

This was a significant factor for clerical legal power²⁴⁷ and gave rise, when it suited those subject to it, to jurisdictional challenge. Elizabethan and Jacobean legislation also encroached on a range of issues that were originally the subject matter of ecclesiastical jurisdiction such as bastardy, religious non-conformity, and perjury.²⁴⁸

²⁴³ The canon is quoted in Chapter Eight regarding an appeal against excommunication.

²⁴⁴ Hale (n234) 23. This is explained further in Chapter Seven.

²⁴⁵ Gerald Bray (ed) *The Anglican Canons 1529-1947* (The Boydell Press 1998) 258.

²⁴⁶ *Middleton v. Croft* (1736) 93 ER 1030 (Hardwicke LJ). The principle was subject to whether a canon was, effectively, already approved, through Henrician statutes. For a full discussion and an analysis of this case, see Richard Helmholz, *The Canons of 1603: the Contemporary Understanding*, in Norman Doe, Mark Hill, Robert Ombres (eds) *English Canon Law* (University of Wales Press 1998).

²⁴⁷ Craig Horle, *Quakers and The English Legal System 1660-1685*, (1st edition, University of Pennsylvania Press 1988) 44.

²⁴⁸ Details are contained in Helmholz (n183) 30.

Consequently, people were subject to parallel legal systems that dealt with the same or associated issues yet with differentiated aims and provisions. Hale cites *Cawdrey's Case*, 1591:²⁴⁹

The ecclesiastical law and the temporal law have several proceedings and to several ends: the one being temporal, to inflict punishment upon body, lands or goods: the other being spiritual pro salute animae ... to reform the inward [man].

Many new canons, particularly in the first half of the seventeenth century, often re-stated existing law, or effectively re-iterated decretals, such as following questions that had arisen in litigation.²⁵⁰ They lacked express sanctions. This was partly because ecclesiastical law was as much for guidance as for coercion. The problem became compounded by the fact that the lack of use of a canon could create a prescriptive custom to the contrary.²⁵¹ To some extent, in practice, in local parishes, the use of canons to bring proceedings depended upon the appetite, and perhaps the learning, of the promulgator of the cause. An example of citation of canon law by the promoter of a cause, the vicar of Kendal, is seen in Chapter Eight.

Although temporal proceedings could not be passed over to ecclesiastical jurisdiction, those that arose under ecclesiastical jurisdiction could be transferred to the secular courts in certain circumstances. The mechanisms frequently involved referring the offender to local JPs. Instances under specific tithe legislation and in relation to enforcement of excommunication are provided in Chapters Seven and Eight respectively, because this had consequences for the outcome of proceedings in relation to Quakers. More specifically, this process contributed to the imposition of severe penalties, including imprisonment.

²⁴⁹ *Cawdrey's Case* (1591) 77 English Reports 1.

²⁵⁰ Helmholz (n183) 23.

²⁵¹ Helmholz (n183) 23.

There was no provision for appeals to the secular courts against the ecclesiastical courts' decisions but their processes could be challenged. This was particularly (although not exclusively) through writs of prohibition which common law judges were increasingly willing to issue.²⁵² They were predicated on the basis that the ecclesiastical courts had exceeded their jurisdiction.²⁵³

From a jurisdictional point of view, and with a long-term perspective, legal historians have referred to the competition for jurisdiction and power between the three secular courts, King's Bench, Chancery and Exchequer, and the ecclesiastical courts. The former established dominance, which is generally regarded as being due to the ascendancy and rationalisation of the common law over time. The issue of writs of prohibition, is stated²⁵⁴ to have compounded the instability in ecclesiastical law brought about by the continued argument over the role of custom, the abolition of direct papal authority and the effect of parliamentary statutes.

However, the status of ecclesiastical power was not, at this juncture, simply a legal jurisdictional issue. It was also both a consequence of the political denouement of the Civil War's struggle between parliament, the monarchy and the bishops, and an economic one. Over time, bishops never regained their political dominance.²⁵⁵ Their numbers in the House of Lords reduced to almost a third of those in pre-Cromwellian times. The Heresy Act 1678,²⁵⁶ which abolished the writ *de heretic carburendo* and 'limited the power of Church courts in cases of heresy to the imposition of spiritual penalties'²⁵⁷ may, nowadays, be seen as enlightened reform but there was a distinct anti-episcopal power component inherent in this legislation.

²⁵² Helmholz (n183) 48.

²⁵³ Helmholz (n183) 4.

²⁵⁴ Helmholz (n183) 6.

²⁵⁵ Christopher Hill, *The Century of Revolution, 1603-1714* (2nd ed, Routledge 1980) 203.

²⁵⁶ 29 Car II c.9.

²⁵⁷ Hill (n 255) 209.

Ecclesiastical Court Procedure

Introduction

The ecclesiastical courts' functions were, following canon law, corrective to deal with spiritual matters, adjudicative for private litigation; they also had a role in the verification of wills and property inventories, and licensing of midwives, teachers and church officials.²⁵⁸ The clergy derived an income from such licensing. Criminal proceedings included heresy, fornication, adultery. Whilst all offences constituted sins against God, murder, theft and burglary were dealt with by the King's Bench. Ecclesiastical civil cases included tithes, ecclesiastical benefices, matrimony, divorce, testamentary and associated causes such as probate and legacies.

Office causes concerned matters arising from visitations or 'common fame' for immoral behaviour. Instance causes began with an oral or written complaint. The parties were summonsed to a specified court, the proceedings, including individual's names, were conducted in Latin.²⁵⁹ If there was a case to answer, the parties had to swear oaths of calumny²⁶⁰ that their cause was just and they were honest and would not put forward false evidence.

Ecclesiastical court procedure was inquisitorial and slow. The evidential process was elaborate and expensive. Particular causes, such as tithes, had their own designated procedures.²⁶¹ At the first hearing, the accusing proctor presented the case and the defending proctor raised objections. At the second hearing, the accusing proctor met the objections and the defender answered. The judge then took evidence to determine the charge. A minimum of two and commonly ten or twelve witnesses were required.²⁶² The submission of written responses required the preparation of written depositions. Ecclesiastical courts were not

²⁵⁸ This section is summarised from Outhwaite (n219) Chapters One and Two. See also, for a contemporary account, Consett (n238).

²⁵⁹ although written depositions could be in English as the primary sources that I will cite show.

²⁶⁰ Laymen were not always required to swear this oath. See also Chapter Five regarding oaths.

²⁶¹ See Chapter Seven.

²⁶² I cite an example of interrogatories that were administered to several witnesses in a tithe case in Chapter Seven.

empowered to examine witnesses orally in open court until 1854.²⁶³ In York, the practice was that the paying party lodged the witnesses who were examined in camera by the registrar and the opposing proctor. A defendant could be cleared of a charge by the sworn evidence of two acceptable witnesses. Witness evidence could be obtained by commission in the case of infirmity.²⁶⁴ The apparitor summoned and produced the witnesses at a fee of 3s 4d. Once the proctors had adduced the evidence, the advocates took over. Pronunciation of sentence was a solemn process. The Court Act Books record the names of those present. Punishment was not particularised except in those cases where the losing party paid double damages and costs. Unsuccessful clerks, schoolmasters, surgeons or midwives could lose their licences to practice. Defamatory words had to be publicly withdrawn and forgiveness sought from the church congregation. Excommunication could also result.

A judicial warning was given with lesser penalties; penance, including public confession of sin, or payment in lieu for serious ones. Richer members of society could avoid embarrassing ecclesiastical sanctions (such as being paraded in a white sheet) by buying their way out. The loser paid the winner's costs. Ecclesiastical courts aimed to reconcile parties, and causes were often withdrawn so a case could simply disappear. The death of the prosecutor could also end the prosecution. The verbal information and arguments were not recorded and so the determinative argument was not known. A definitive sentence was sent to the local archdeacon to be published and obeyed.²⁶⁵

Appeals

The Act in Restraint of Appeals to Rome 1533, which established procedures for appeals, adopted the canon law maxim that appeals should pass stage by stage

²⁶³ Colin Chapman, *Ecclesiastical Courts, Their Officials and their Records* (1st ed Lochin Publishing 1992).

²⁶⁴ a cumbersome, expensive process that required two or three local incumbents and gentry to attend with the proctor over a period of two or three days at a fee of 6s 8d per day, Till (n218).

²⁶⁵ Borthwick Institute for Archives, What are Cause Papers? Online Guide.

through the hierarchy of courts from archdeaconry to episcopal and finally the archbishop's courts.²⁶⁶

A small number of local ecclesiastical appeals are recorded as having been brought by Quakers. An example is contained in Chapter Eight. An understanding of the local appeal process illuminates the problem that they had in initiating an appeal and pursuing it to a conclusion.

Unlike Canterbury, which developed its own appellate court known as the Court of Arches, York appeal business came to both its consistory and Chancery courts. These were also courts of first instance for normal diocesan business. Consistory cases were mainly instance or civil matters. Chancery cases were mainly office or correctional but both heard testamentary cases. Thus, at York there was no appeal from the diocesan court to a designated provincial appeal court. In the main, appeals from the York diocesan courts went direct to the court of delegates.

In summary, the appeal process, as described by Sheils,²⁶⁷ started with a copy certificate of receipt of the archbishop's letters of inhibition and monition to the officials of the lower court. Letters of inhibition suspended the inferior court's jurisdiction in the cause, usually following the sentence of that court but, appeals could be allowed whilst the case was proceeding through the lower court.²⁶⁸ The process fixed the day and time for the appellant or party prosecuting the appeal to attend York. Letters of monition usually fixed the same day as the date by which the inferior court had to transmit copies of its proceedings to York. These letters were usually followed by copies of the formal acts of court as they had proceeded, followed, in turn, by copies of all documents produced in evidence, usually in the order in which exhibitors were cited. Copies were sealed and attested as true copies by the registrar of the inferior court or his deputy.

²⁶⁶ WJ Sheils, *Ecclesiastical Cause Papers at York: Files Transmitted On Appeal 1500-1883*. (Borthwick Texts and Calendars: Records of the Northern Province 9 1983).

²⁶⁷ Ibid iii-x. For more precise detail on ecclesiastical appeal procedure, see Consett (n238) 184-250.

²⁶⁸ In the excommunication chapter, one of the cited articles of appeal appears to refer to this.

Appeals were expensive. The cost of obtaining the acts of court and having them sent to York in 1675 were between £1 14s 2d and £2 15s.

Parties initiating appeals were usually the better off peasantry and townsmen or their social superiors.²⁶⁹ Sheils' analysis of York appeals²⁷⁰ found that they concerned matters of financial or legal importance to the parties, rather than reputation or morality which occupied a lot of lower courts' work. This is an important point in relation to the limited number of Quaker appeals, which, from admittedly scant sources, in my view, tend to confirm this finding.²⁷¹

Appeals against sentence had to be launched within ten days. The appeal process was slow, especially because of the laborious procedure for obtaining witness evidence, and appeals had to be renewed each year otherwise they lapsed. The registrar produced an account of the proceedings and charged by the page and time spent. Till says that the majority of appeals to York were testamentary or tithes and that there were relatively few.²⁷² The database contains 25 between 1661 and 1667, of which ten were testamentary and five were tithes. However, there was a batch from Richmond between 1678 and 1680.²⁷³

Court Fees²⁷⁴

The level of fees that were determined by Archbishop Whitgift in 1597, and reiterated in Canon 135 (1603), did not change upon the Restoration. Proctors' and advocates' fees varied according to diocese and had to be published in the court and in the registry by the registrars in accordance with Canon 136. In York, proctors charged five shillings per term per client; advocates ten shillings. In some dioceses, including Richmond, proctors charged two shillings by the day. Proctors' bills were produced at the end of a case, were itemised and subject to taxation by the court. Till says that they were commonly reduced. Proctors were

²⁶⁹ Sheils (n266).

²⁷⁰ Sheils (n266).

²⁷¹ I have not undertaken a full survey of Quaker ecclesiastical appeals locally, although this might be an interesting avenue for further research.

²⁷² Cause papers concerning appeals can be seen online from the Borthwick Institute.

²⁷³ Details of which are in Chapter Seven.

²⁷⁴ Till (n218). See also Consett (n238) 247-250 regarding the timing of payment of fees, their enforcement, taxation and appeals.

prepared to sue clients for their fees and this was prevalent in the 1670s and 80s. The fee for commutation for excommunication was between £2 and £5. Till says this was relatively common in the Carlisle diocese.

4. Ecclesiastical Proceedings in the North West concerning Quakers

Pecuniary Ecclesiastical Offences

The church was criticised for its court fees and a large part of the ecclesiastical courts' business concerned the collection of money due to the church, its clergy and officers. The other side of this coin was that the income of the church and its clergy was greatly reduced by the time of the Restoration.²⁷⁵ Spurr says that about a third of the clergy lived in poverty,²⁷⁶ although there were individuals who managed matters so that they became wealthy. Those who held an M.A., such as Ralph Brideoake, a local rector, were entitled to more than one living, as long as not more than thirty miles apart and were assisted by a curate.²⁷⁷

The nature of dues varied. Some were unenforceable customary dues. Others, such as church rates, had acquired legally enforceable status by the fifteenth century.²⁷⁸ Contending with transgressions of established means of raising income was a significant problem for local clergy. The nature of the proceedings brought against Quakers should be viewed in this light and not only as religious bigotry. Further, as is indicated in a letter from the Kendal vicar William Brownsword to Daniel Fleming dated 13th February 1671 (which is discussed in Chapter Eight) following persistent non-payment of tithes, Quakers were regarded as bringing contempt upon the clergy and 'defrauding' the church of its rights.

The majority of ecclesiastical proceedings against Quakers in the North West that Besse records were for tithes. However, other pecuniary ecclesiastical

²⁷⁵ Christopher Hill's classic book, *Economic Problems of the Church, From Archbishop Whitgift to the Long Parliament* (Oxford University Press 1968) discusses this in detail.

²⁷⁶ Spurr (n199) 177.

²⁷⁷ Spurr (n199) 177.

²⁷⁸ Helmholz (n183) *Tithes and Spiritual Dues* 26-30.

offences feature, particularly during the 1670s. There were 17 prosecutions for refusal to pay for 'steeplehouse'²⁷⁹ repairs. Three of these, in 1671, resulted in imprisonment for 18 months for a repair valued at 3s. One case involved refusal of £3 'prescription money' in 1673. Eight cases concerned refusal to pay 'priest's' wages', in 1673, 1675 and 1677 respectively. Four more were for failure to pay church dues and rates, two for failure to pay marriage fees and nine for failure to make Easter-offerings.²⁸⁰

According to Hill,²⁸¹ the Archdeacon of Durham reported in 1666 general complaints of ministers and churchwardens that they cannot get any sesses (assessments) for reparation of churches 'because they had no coercive powers; and justices of the peace refused to assist.' The latter impediment was not universal. In the historical North West, many JPs were willing to take a hand in ecclesiastical cases against Quakers as will be seen.

Fleming's²⁸² papers²⁸³ contain his correspondence with the Kendal vicar, Brownsword. Brownsword brought proceedings against several Quakers for failure to make Easter-offerings which resulted in their imprisonment and the imposition of a fee of 40 shillings to be discharged. In a letter to Fleming, he writes rather desperately:

I humbly beg your advice in this case, which if caused against, will reduce our already poor Vicarage and the dues into almost nothing... and encourage many ... if not to harm or turn in Quakers...to become quarrelsome and vexatious ...

Brownsword's letter begins *Upon that encouragement you gave me at Kendall*. Whether this was the vicar's instigation or confined to the tithe issue is not clear, but it is apparent that Brownsword relied upon Fleming in his capacity as JP for enforcement of these ecclesiastical matters. It evidences close association with

²⁷⁹ The Quaker term for churches.

²⁸⁰ Easter-offerings were of more significance than is appreciated nowadays.

²⁸¹ Hill (n275) 209.

²⁸² Daniel Fleming was a Deputy Lord Lieutenant and JP, whose seat at Rydal in Westmoreland was close to the centre of Quaker activity. He was a widely connected royalist Anglican who detested Quakers.

²⁸³ WDRY/Box 31 (Cumbria Archive, Kendal).

the local incumbent noted by Spurr.²⁸⁴ As will also be seen in the following section, there was, accordingly, a degree of collaboration between the clergy and magistrates with regard to law enforcement.

Visitations

Introduction

With respect to the North West, 383 sets of ecclesiastical proceedings were reported in Besse between 1660 and 1685. These do not include the proceedings that followed visitations, which are almost too numerous to count.

Whilst Reay thought that the ecclesiastical authorities did not appear to have been as systematic in their persecution of Quakers as the secular authorities,²⁸⁵ there are instances in the North West region that seem to indicate waves of ecclesiastical proceedings. These often followed visitations. The individual and personal nature of ecclesiastical suits did not tend towards mass proceedings. Canon law did not permit a corporate excommunication since this could involve the innocent as well as the guilty.²⁸⁶ This had positive implications for Quakers as we shall see in Chapter Eight.

It was a duty under ecclesiastical law to attend the local parish church and this had become an offence under The Religion Act 1581²⁸⁷ which imposed a fine of £20 per month on non-attenders. From the 1670s, ecclesiastical authorities used non-attendance at church as a basis for reporting non-conformists on a grand scale.²⁸⁸

One consequence of the re-establishment of ecclesiastical authority was the resumption of visitations, the consideration of which begins this study of the 'persecutions' endured by Quakers. This topic has not been explored in any detail

²⁸⁴ Spurr (n199) 209.

²⁸⁵ Reay (n180).

²⁸⁶ Gibson 1048 (cited in Burn (n238) 201).

²⁸⁷ 23 Eliz 1 c1.

²⁸⁸ Punishment for absence from national worship forms one of the subjects of Chapter Six which examines these offences in detail.

in the literature. However, it is important for showing a number of matters, in particular:

- the scale of ecclesiastical procedures to which Quakers were subject
- the potential for the escalation of proceedings and penalties once Quakers had been cited at visitations
- the extent to which the church authorities were involved in the suppression of Quakers

***Purpose and Nature of Visitations.*²⁸⁹**

The overall purpose of visitations was church governance and correction of offences.

Originally, visitations were personally carried out by bishops but under Canon 60 annual visitations became delegated to archdeacons, with bishops visiting every third year. Archdeaconry courts started to deal with annual visitations in the spring of each year, and usually carried them out at Easter and Michaelmas. In Carlisle, which was a small diocese, the bishop and the archdeacons took it in turns to undertake the visitations. Archbishops' visitations took place upon their accession and thereafter every four years.

Instead of the visitor attending every separate parish, the custom was developed whereby clergy and people were cited to attend visitations. During the bishop's triennial visitation, inferior jurisdictions were inhibited,²⁹⁰ but the visitation court itself had jurisdiction. Refusal to appear to a citation there could result in punishment for contumacy.

²⁸⁹ This section provides an outline. For a detailed contemporary account, see Burn (n238) 18-30.

²⁹⁰ Such inhibition was subject to relaxations in certain cases, *ibid* 1050.

Churchwardens

Churchwardens were pivotal to local legal processes. Canon 85 concerned their duty for church reparations and maintenance. They were also enjoined to *see that in every meeting of the congregation peace be well kept; and that all persons excommunicated and so denounced be kept out of the church.* They had responsibility for reporting secular and ecclesiastical offences, and they were answerable to both justices of the peace and ecclesiastical authorities, although they were not required to report misdemeanours outside of visitations by Canon 117. They could face a dilemma in terms of neighbourly relations because they lived close to those they were required to report upon.

Churchwardens retained some discretion as to the visitation presentments but there was pressure applied to them to do their duty, with penalties if they did not. Further, visitation articles imposed mandatory requirements upon them. Critics of churchwardens for reporting Quakers rarely acknowledge their legal obligations. Under Canon 119, articles of inquiry were proscribed. Articles set out the matters with which the visitations were concerned. The standard articles were also adapted to the concerns of the time. In the period in question, some of these required returns of Quakers, non-conformists and those who did not attend church. Churchwardens grounded their presentments upon these articles. The book of articles also contained the churchwardens' oath. The 1669 oath was:

You shall swear to enquire with your best diligence and to make a true Answer to every Article in this Book now given you charge, and to present every person that now is, or of late was inhabiting within your Parish, that hath done any offence, or omitted any duty therein mentioned. And this you shall do, as in sight of God uprightly, and truly, without favour or malice, hope or reward, or fear of displeasure. So help you God.

Canon 115 protected churchwardens by stipulating that judges should not admit any complaint against them for their presentments, with a presumption that presentments were not done maliciously. However, Canon 26 deemed wilful failure to report offences 'the horrible crime of perjury'.

Those cited by churchwardens to the visitation court could be required to attend correction courts. Entries in the database compiled from Besse show that Quakers in the North West were sent to the Manchester correction house and the Richmond archdeaconry court which also functioned as a corrections court.

Parish churches kept a copy of relevant canons. Ecclesiastical court officers could also carry on proceedings²⁹¹ in their homes and churchwardens did so at local level. The following example²⁹² shows that they collected fines for conventicles under the Conventicles Acts: ²⁹³

Churchwarden's Receipt of Quakers' fines for a conventicle at John Hudson's house, 5th October – 27th October 1684:

Rect. Of John Tomlinson -Richard Atkinson £10 10s.

John Hudson's fine £20 10s.

And his wife fined at the same time 5s.

Rbt Wallery 's fine £10

Thos Atkinson's fine 10s.

Mary Fleming's fine 5s

John Preston's fine 5s.

Archbishop Sterne's Visitations

Sterne's visitation articles²⁹⁴ for 1663 as Bishop of Carlisle, and 1669 as Archbishop of York contain the following terms:

IV. Are there any who affirm, that the Rites and Ceremonies of the Church of England by Law established, are wicked, Antichristian, or superstitious? or that it is not Lawful to approve, use or subscribe to them?

²⁹¹ Also cited in the tithes chapter as an example of use of manor courts and the Conventicles Acts to recover fines instead of tithes.

²⁹² abbreviated from WD/D/B2/24 Beetham Manor Court records, Cumbria Archive, Kendal.

²⁹³ The Conventicles Acts are discussed in the following Chapter.

²⁹⁴ Church of England, Diocese of Carlisle, Bishop (1660-1664: Sterne): *Articles to be enquired of in the diocese of Carlisle in the visitation of the Right Reverend father in God Richard Lord Bishop of Carlisle* (London 1663); Church of England, Province of York, Archbishop (1664-1683: Sterne) *Articles to be enquired of in the metropolitan visitation of the Right Reverend father in God Richard by divine providence Lord Archbishop of York* (Yorr [sic] 1669).

V. Are there any who affirm that the Government of the Church of England under His Majesty, by Archbishops, Bishops, Deans, Arch-deacons, and the rest that bear office in the same, is Antichristian, or repugnant to the Word of God?

VI. Are there any who affirm, that the form and manner of making and consecrating Bishops, Preists and Deacons, containeth anything in it that is repugnant to the Word of God, or that they who are so made, and consecrated, are not lawful Bishops, Preists, or Deacons, till they have some other calling to those Divine Offices?

VI. Are there any who separate themselves from the Communion of the Church of England, and combine themselves together in a new brotherhood, challenging to themselves the name of true and lawful Churches?

VIII. Are there any who take upon them to make rules, orders or concitations in causes ecclesiastical, without the King's Authority, or who submit themselves to be ruled and governed by them; or who hold private Conventicles, or are present at them?

IX. Are there any who ...publish, sell, ... or convey to others, any superstitious, seditious, heretical, or schismatical books, libels or writings?

Those presentments carried out upon Richard Sterne's accession as Archbishop of York show little of note. The majority of entries concern meetings, and refusal of oaths, which were also of secular concern.

In marked contrast, the 1669 Archbishop's visitation, when anti-dissent raged in parliament, clearly focuses upon recusants, non-conformists and Quakers (as well as the usual entries concerning brawling in church, fornication and illegitimacy, and internal church organisation.)²⁹⁵ Under each parish there is a list of names of Quakers and popish recusants as shown in the Appendix. In some cases, there is an additional narrative. The only record in Besse is the 1669 visitation for Hawkshead which names George Benson, John Braithwaite, Reginald Holme, Thomas Jackson, Jacob Rigg, Satterthwaite and Elizabeth and William Walker.

²⁹⁵ MF131836/1837(Borthwick Institute).

This visitation may have been connected to the instructions of Archbishop Sheldon, in events preceding the enactment of the 1670 Conventicles Act. He wrote to the Archbishop of York in June 1669, in a letter distributed to local magistrates:²⁹⁶

...the King desires that enquiry be made in every diocese what conventicles are held in every parish ...when any conventicles cannot be hindered by the bishops, complaint is to be made to the nearest JP and any negligence is to be certified to the king.

This is reflected in the extract from Sheldon's letter below,²⁹⁷ to the bishops of his own province about the act for suppressing conventicles, Lambeth House, 7th May 1670, which shows the correlation between political events and local ecclesiastical activity. It further illustrates the resort to civil magistrates and procedures for enforcement of ecclesiastical matters.

... Thirdly, your Lordship is further desired to recommend to [the ecclesiastical judges and officers and the clergy of your diocese] the care of the People under their respective Jurisdictions and charges that in their severall places they do their best to persuade and winne all Non – Conformists and Dissenters to obedience to His Maj. Laws and Unity of the Church, and such as shall be refractory, to endeavour to reduce by the censures of the Church, or such other good means and ways as shall be most conducing thereunto

And so I advise that (the above) take notice of all Non Conformists Holders, Frequenters, Maintainers of Conventicles and unlawfull Assemblies under pretence of Religious worship, especially of the Preachers and teachers in them and the places wherein the same are held...And wherever they find such wilfull offenders, they do addresse themselves to the Civil Magistrates, Justices and Others concerned imploring their help and assistance for or suppression of the same according to the sd. Act in that behalfe made and sett forth.

²⁹⁶ Cited in Thomas Nicholson and Ernest Acton, *The Older Non-Conformity in Kendal* (Titus Wilson 1915).

²⁹⁷ Reports and Acts collected by John Browne, Clerk of Parliament 1660-1694, Parliamentary Archive, BRY/9/H 52.53 (7.5.70).

5. Fifthly, lastly, give as many copies of this letter as necessary to ecclesiastical officers and clergy.

...I have this confidence under God that if we doe our pars now, at first seriously by God's help and the assistance of the Civil Laws, considering the abundant care and provisions(?) this Act containes for our advantage we shall within a few months see so great an alteracon in the distraccons of those times as that the seduced People returning from their sedicous and self seeking teachers to the Unity of the Church, and Uniformity in God's worship.

What happened in practice, as examples in the tithe, praemunire and conventicles chapters particularly show, is that, in so far as their political interests were aligned against dissenters, local clergy could join with the local gentry in enforcing one another's causes.

Records of Visitations in the North West between 1660 and 1665

Visitation records indicate 'the amount of control the church had over communities and data on changing patterns of belief, particularly the survival of Catholic recusants and the growth of Protestant non-conformity, the breakdown of marriages and sexual misconduct, disputes over tithes and taxes as well as over pews within churches, the decay and disrepair of church buildings and the use and abuse of churchyards.'²⁹⁸

Visitation courts could deal with matters summarily. Accordingly, the record of matters in the visitation book may constitute the only evidence of a case brought against an individual. Local records, whilst short on detail, provide an insight into the volume of proceedings against Quakers that resulted from visitation presentments.

²⁹⁸ Extract from Borthwick Institute website concerning the ongoing project to digitise visitation records.

Bishop of Chester's Visitation 1665

A translation of the 'jumble' of Latin and English records of the cases that were presented after the Bishop of Chester's 1665 visitation had taken place and that had been tried before two commissioners, was undertaken by William Fergusson Irvine.²⁹⁹

Those for the Deaneries of Wirral have no entries. On the other hand, the Deanery of Warrington, following a visitation held 11th December 1665, at Wigan, contained entries for ten parishes. Typical entries are:

Mellinge Chapellry in the Parish of Halsall: Against Thomas Hickocke, schoolmaster, a Quaker, for teaching a private schole in William Martin's house.

Sephton. Against Richard Johnson, Anthony Wetherby, Edyth wife of John Hulton. John Smallshowe and Ellen his wife, Quakers.

Warrington. Against John Pickeringe, and John Barrowe (already cited as Quakers) for not burying their dead att the Parish Church.

Ormskirke. Gentelmen. Wee the Churchwardens of the ish of Ormskirke, humbly offer these things to yor consideracon: - Against Thomas Crosby. Quaker, for opening his shop and exposing his wares for sale upon holidays. Against Henry Fosstart (already cited as Quaker) for not paying the rate assessed on him towards the repair of the Church, 4d. Against James Barton, junior, and Elizabeth his mother, for the same, 1s.3d. ...

Irvine says, in an over-simplification, that 'all the Bishop could do to the delinquents was to ... excommunicate them' and that, if they disregarded that, the Bishop could take out a *writ de excommunicato capiendo*,³⁰⁰ 'and the civil authorities ...appeared on the scene and imprisoned, fined and so on.' In fact, this was not the only step the offenders could be adjudged liable to pay the said rates there and then and to summary correctional proceedings.

²⁹⁹ William Fergusson Irvine 'Extracts from the Bishop of Chester's Visitation for the year 1665, relating to Friends' II/8 Journal of Friends Historical Society 97-100.

³⁰⁰ The process is discussed in full in Chapter Eight.

Archdeaconry of Richmond Visitations

The *Compert Books*, which were compiled by the bishop's commissioners following visitations from 1662 onwards, list Quakers and other separatists failing to attend church for every parish. This shows a very high number of presentments for Quakers.³⁰¹

A visitation during the period of office of John Pearson, deputy to the Bishop of Chester, 1673-1686, resulted in the excommunication of George Fox. The exact original offence is not known but he was summonsed before Joseph Craddock in Richmond.³⁰²

Presentments tended to simply list names and such simple description as "being Quaker" and occasionally added details of a specific ecclesiastical offence. A county-based collection of presentments for the whole country confirms this.³⁰³

The Compton Census 1676³⁰⁴

Compton, the Bishop of London, instructed by Sheldon, drew up the terms of this census. Charles II approved it at the instigation of the Lord Treasurer, Danby. Its aim was to identify the scale and location of recusants and non-conformists. Danby wanted to evaluate their effect upon the support for the Church of England in connection with what was perceived as the King's growing tendency towards toleration. By this stage, it was clear that dissent against the Church of England was persisting.

The census posed three main questions:³⁰⁵

³⁰¹ Archdeaconry Compert Books (ARR/1/2 Series, Lancashire Archive).

³⁰² Cited in H Larry and Jan Ingle, 'The Excommunication of George Fox' [1991] 56/2 Journal of Friends Historical Society 71-77 and discussed further in Chapter Eight.

³⁰³ G. Lyon Turner 'Presentments in Ecclesiastical Visitations' [1916] Journal of Friends Historical Society.

³⁰⁴ The information in this section is based upon *The Compton Census of 1676: A Critical Edition*, (ed. Anne Whiteman) (British Academy Records of Social and Economic History, New Series 10. Oxford University Press 1986). The original Census, as recorded by Whiteman, is held in the Bodleian Library, Oxford in the William Salt Library in Stafford MS 33 and MSS Tanner 144 and 150. Whiteman's work analyses the census in the context of criticism of its value and limitations.

³⁰⁵ Whiteman (ibid) shows that the exact wording varied according to how Sheldon phrased his instructions in each letter.

- i) *What number of persons of age to receive communion are within your parish?*
- ii) *What number of persons are popish recusants or suspected for such in your parish?*
- iii) *What number of other dissenters (of what sort soever) which obstinately refuse or wholly absent themselves from the communion of the Church of England at such times as by law they are required to communicate?*

The Compton census was not a visitation per se, but in particular areas, it was carried out at the same time. Sheldon's direction to Archbishop Sterne in January 1676³⁰⁶ suggested the census be performed at the Easter visitation.

Only the returns of Carlisle, York (and incomplete returns from Chester) exist for the province of York. According to Whiteman, the census is unreliable for the numbers of Protestant non-conformists. Carlisle (the only diocese throughout the country which separately asked for a return specifically about Quakers) returned the following figures: ³⁰⁷

Deanery	Communicants	Popish Recusants	Quakers	Other Dissenters
Alndale	4,662	15	262	112
Carlisle	6,144	41	126	56
Cumberland	5,213	13	56	273
Westmoreland	6,990	33	110	10
	23,009	102	552	451

This shows that the fierce local opposition to Quaker from the royalist, Tory gentry was irrespective of proportionately low number of Quakers.

³⁰⁶ DRC1/4/f 589 (Cumbria Archive, Carlisle) cited in Whiteman, *ibid*, General Introduction.

³⁰⁷ Whiteman (n304) 616.

Whiteman ³⁰⁸ estimates the numbers of recusants and Protestant non-conformists as an overall percentage of the population in 1676. I have amalgamated her estimate for York, Carlisle and London (for comparison):

	<u>Population</u>	<u>Recusants</u>	<u>%</u>	<u>Non-conformists</u>	<u>%</u>
York	193,926	2,214	1.14	7,544	3.89
Carlisle	23,009	102	.44	1,003	4.36
London	175,585	700	.40	2,785	7.28

Overall, Whiteman shows that the census calculated Protestant dissent at between three and four per cent of the population, although the concentrations of dissenters varied greatly throughout the country.³⁰⁹ The Compton Census obviously returned only a relatively small number of Quakers. On this basis, one might ask if this implies that the Quakers' complaints of persecution were exaggerated.

5. Conclusion

This chapter places the restored ecclesiastical jurisdiction and court structure pertaining to the North West as a fundamental context through which to understand the types of ecclesiastical proceedings with which local Quakers were involved. This is the case both with regard to specific ecclesiastical laws, especially those relating to tithes and excommunication, and because it demonstrates how church Anglicanism and the re-assertion of episcopal power permeated the law as it was applied to Quakers.

Although, as we have seen, there were secular procedural limitations upon the ecclesiastical courts, such as prohibition, in practice, there were few safeguards against disproportionate punishment. Quakers were exposed to potentially

³⁰⁸ Whiteman (n304) Appendix F to the General Information.

³⁰⁹ Whiteman (n304) cxxiiiff, cited in William Gibson 'The Limits of the Confessional State: Electoral Religion in the Reign of Charles II' [2008] 51/1 *The Historical Journal* 27-47 (footnote 11).

biased royalist Anglican JPs in respect of the transferred enforcement procedures discussed in Section 3. Harsh measures such as imprisonment could result from theoretically innocuous transgressions, such as not attending church³¹⁰ which were picked up systematically through the restored visitation process.

This chapter has also suggested that the way in which English canon law which was flexible and covered 'black letter' law, regulation and reflected political concerns, operated in practice appears to have crept away from its pure 'principles of sound reason and natural justice,'³¹¹ as described in Section 3.

I have referred, in Sections 2 and 4, to the political association between royalist Anglican clergy and their secular counterparts with regard to their opposition to toleration and monitoring of dissent within local communities. The limited direct documentary evidence that I have researched suggests collaboration between clergy and secular law enforcement. I return to this theme in the following chapters.

The Quakers' criticism of local clergy and officials for religious bigotry paints a one-sided picture when compared to their wholesale flouting of the law. The other side of the coin was that of compromising the authority of the church and church courts. Spurr blames Restoration non-conformists in the country as a whole for this.³¹² Local evidence, such as Brownsword's correspondence with Fleming, referred to in Section 4, refers to Quakers' contempt for the church and its financial rights.

The 1676 census indicated a low number of Quakers to engage the interest of both the secular and ecclesiastical authorities against them. I do not think, however, that their complaints of sufferings and persecution were exaggerated when the effect of the visitation returns and the scale of ecclesiastical offences

³¹⁰ The question of whether they were actually innocuous is examined in Chapters Three and Six.

³¹¹ Thomas Bevor 'History of the Feudal and Canon Law' All Souls College, Oxford, MS.110/2 ff.44-5 (cited in Helmholz (n183) 55).

³¹² Spurr (n2199) 198.

and proceedings for not attending church that is indicated in Section 4 are taken into account. The bare census figures do not reflect the frequency of returns in the visitation records – in other words, visitations constituted a penal legal process over and above counting Quakers in a census. It is essential, therefore, to take account of these neglected records in order to understand the nature and scale of ecclesiastical proceedings against Quakers.

The next two chapters move away from ecclesiastical law for the time being, although they follow the direction of policy towards absolute conformity with the Church of England. They address the issue of Quaker meetings for worship.

Chapter Three

HOSTILITY TOWARDS QUAKER MEETINGS: THE LEGAL AND POLITICAL CONTEXT

1. General Introduction

The previous chapter considered the impetus behind the restoration of ecclesiastical jurisdiction, the mechanics of the ecclesiastical courts and the effect of the re-embedding of traditional Anglicanism upon Quakers in the North West. It showed that the relative latitude that had been allowed to the various groups who dissented from the Church of England to meet and worship in their own way was curtailed at the outset of the Restoration. Such curtailment, given statutory force by the Act of Uniformity, was not easily, or in some cases at all, accepted by those who had enjoyed it, of whom Quakers were a prominent cohort. As a result, the government, strongly supported by the bishops, moved to suppress meetings for worship outside of the established church.

The suppression of Quaker meetings was one of the main causes of their complaints of persecution.³¹³ This topic is familiar to historians of early Quakerism, who, generally, echo the views of the early Quakers that such proscription amounted to religious bigotry. Vehement opposition to silent meetings for worship by ostensibly peaceable people would, indeed, at first sight, appear persecutory. In this chapter, I examine the legal grounds for the restriction of meetings and critically analyse the allegations of persecution. This involves a consideration of the range and specific provisions of the law, the nature of Quaker meetings and activities, their peace testimony, the political climate, and the roles of those accused of acting in a persecutory manner. It also

³¹³ The historical and political context of their experience is relatively well known and is dealt with in the histories referred to in the introductory chapter, such as William C Braithwaite, *The Second Period of Quakerism* (Cambridge University Press 1952).

touches upon the backlash against toleration that is reflected in the vacillation of royal policy and so affected the treatment of Quakers.

2. Proscription

Introduction

The hostility towards Quakers meeting together was partly derived from the view that they were involved in sedition. This view was carried over from before the Restoration, when meetings could constitute fora for the discourse of religious and political views.

In the seventeenth century, there was no overarching rule against meetings per se. Under the common law, proceedings could be taken against assemblies of people who disturbed the peace. Hobbes,³¹⁴ in 1651, said *concourse of people is an irregular system, the lawfulness, or unlawfulness, whereof dependeth on the occasion, and on the number of them that are assembled.*

The anonymous author of a legal critique of the Conventicles Act 1664³¹⁵ cited Dalton's Manual: ³¹⁶

... every man in peaceable manner may assemble a meet company to do any lawful thing.

an unlawful assembly... is where three persons or more shall gather together... to do some unlawful Act with force or violence... If after their meeting they shall move forward toward the execution of any such act this is Rout. And if they execute any such thing, this is a Riot.

But it is clear (says the tract) ... that quakers do not meet together for such purpose or intent ...

³¹⁴ Thomas Hobbes, *Leviathan, or the Matter, Forme and Power of a Commonwealth, Ecclesiastical and Civil* (First Published 1651, Blackwell's Political Texts 1946) 155.

³¹⁵ Anon, *Christian Toleration or Simply and singly to meet upon the Account of Religion, really to Worship and served the Lord, without any unlawful Act to be done or intended is not an Offence against the Law* (1664) (Box 22/22 Quaker Archive).

³¹⁶ Michael Dalton, *The Country Justice, containing the practice of Justices of the Peace out of their Sessions* (London 1618).

The legal restriction of Quakers' meetings thus arose, initially, as a result of their being perceived, and deemed, to constitute an unlawful occasion. Discussion of the common law and of the legislation (which follows) points to the fact that, from at least the outset of the Restoration, the law did not support large gatherings of people for religious purposes, other than within the confines of the Church of England.

Legislation

Introduction

Over the twenty-five-year period in question, different legislation was applied at different times. Legislation specifically prohibiting conventicles was enacted to further Anglican political interests in conjunction with establishing uniformity in the Church of England. As we shall see, there was a climate of suspicion which was not wholly without foundation. The causal effect of plots against Charles II, is relevant, but so, as far as the law was concerned, is the effect of events that are reflected in Elizabethan and Jacobean legislation, such as the Gunpowder Plot.³¹⁷ The Act against Seditious Sectaries 1592 ³¹⁸ prohibited

coming to, or being present at any unlawful assemblies, conventicles, or meetings, under colour or pretence of any such exercise of Religion, contrary to the laws and Statutes of this Realm...

and provided that *every person lawfully convicted shall be committed to prison until they conformed*. It was a moot point as to whether this Act remained in force. The Popish Recusants Act 1605 ³¹⁹ and Oath of Allegiance Act 1609 ³²⁰ also required oaths of allegiance as well as prohibiting meetings. These old Acts were brought into play from 1660.

The full text of the King's January 1661 Proclamation,³²¹ which initiated the crackdown, is summarised below and set out in full in the Appendix. Whilst this did not have the status of an Act of Parliament, those charged with its

³¹⁷ This is discussed in Chapter Six.

³¹⁸ 35 Eliz c1.

³¹⁹ 3 Jac c4.

³²⁰ 7 Jac c6.

³²¹ Taken from the papers of Sir Peter Leycester, Deputy Lord Lieutenant (DLT/B11 Chester Archive).

implementation were directed to the said earlier legislation which contained a range of severe sanctions from fines, through to imprisonment and praemunire.³²² This was also connected to the requirement to swear an oath of allegiance. From the 1670s, the authorities resorted to this legislation with more determination. Penalties under these Acts were the cause of intense suffering and are commonly dealt with in the histories under the narrative of persecution coupled with the Conventicles Acts. However, this legislation was not necessarily used against unlawful meetings in the 1670s and 80s, although it was a corollary of holding separate meetings for worship and not attending church.³²³

In general, 'conventicle' meant unofficial religious assemblies of lay people. The Restoration brought in three Acts (which are explained below) to deal with the perceived problem of Protestant non-conformist meetings and they encompassed an increasingly wide definition of conventicle. These reflected the dominant political opinions. Seaward's book³²⁴ shows the interplay between the several factions which included Presbyterians, Catholics, Anglican royalists, and bishops. The proponents of the legislation were largely the royalist Anglicans in parliament, and bishops in the House of Lords. I contend that the impetus against Quakers came from them rather than local JPs. Papers in the parliamentary archive show the machinations by which the precise terms of the legislation came about, through reference back and forth between the drafting sub-committee, the House of Lords and the House of Commons.³²⁵ Frequently, the Commons are recorded as having rejected provisos.

The Quaker Act 1662. ³²⁶

This Act was entitled *An Act for preventing the Mischiefs and Dangers that may arise by certaine Persons called Quakers and others who refuse to take lawfull*

³²² For detail see Chapter Six.

³²³ I have differentiated this from sufferings for meetings and so this legislation is discussed in Chapters Five and Six.

³²⁴ Seaward Paul, *The Cavalier Parliament and the Reconstruction of the Old Regime, 1661-1667* (Cambridge University Press 1989).

³²⁵ HL/PO/JO/10/1/284; HO/PO/50/10/1/313; HO/PO/JO/10/1/320 (Parliamentary Archive).

³²⁶ 14 Car II c.1.

Oaths.³²⁷ The House of Lords debated as to how many people would constitute an illegal meeting, whether it should refer only to Quakers and cavilled at demonising whole groups. The Act's proponents were not concerned with the niceties of who was or was not a 'true' member of the Society of Friends.³²⁸ The point that no true distinction was drawn between Quakers and other 'sectaries' is developed below.

Quakers may have been used as fall guys:

3rd July 1662 ³²⁹

Williamson to Secretary Nicholas: *The Commonwealth men still resolve to wait till the Presbyterians take the lead. They keep quiet themselves, and laugh to see the Quakers and others drawn to prison, while they blow the fire by seditious pamphlets...*

Seaward says Presbyterians were enthusiastic supporters of the Act. ³³⁰

The Act's preamble (as summarised) was:

Whereas...certaine persons under the names of Quakers and other names of Separation have ... under a pretence of Religious Worship do often assemble themselves in great numbers...to the great endangering of the Publick Peace and Safety and to the terror of the People by maintaining a secret 'and' strict correspondence amongst themselves and in the meane time separating... themselves from the rest of his Majesties good and loyall Subjects...and usual Places of Divine Worshipp. For the redressing therefore and better preventing the many mischeifs and dangers that do and may arise by such dangerous Tenents and such unlawful Assemblies.

The Act made refusal of oaths unlawful, and stipulated that those who refused or persuaded others not to swear *by Printing, Writing, or otherwise* ³³¹ would, if they then met together be subject to the following provisions.

³²⁷ Its short title is the Quaker Act.

³²⁸ At this juncture, they may not have been fully aware of the burgeoning formalisation of the Society.

³²⁹ Mary Anne Everett Green and Others (eds) *Calendar of State Papers, Domestic Charles II* (London: Longman, Green, Longman and Roberts 1860-1939) Vol. LVII.

³³⁰ Seaward (n324) 171.

A conviction, either by jury, confession, or *notorious evidence*, for attending an assembly of more than five *under pretence* of joining in unauthorised religious worship led to maximum fines of £5 for the first offence, £10 for the second; to be levied by distress and sale of goods under warrant. Failure to pay the fine within one week of conviction led to three months for the first offence and six months for the second, without bail and with hard labour. A third conviction required the person to abjure the realm or be transported to the King's plantations overseas. Offending lords had to be tried by their peers.³³²

Offences could be determined by the justices of assize, Oyer and Terminer and JPs. JPs and mayors were authorised to commit to gaol or bind over with sureties to quarter sessions. Offenders could be discharged provided they swore the oath and gave security to forbear meeting in an unlawful assembly.

The Conventicles Act 1664.³³³

Although the 1662 Quaker Act, remained in force, *An Act to prevent and suppress seditious Conventicles* was enacted, aimed at Quakers and the wider group of Presbyterian/Puritan non-conformists as shown by its recital of the '1593 Elizabethan Act Against Puritans'.³³⁴ There was uncertainty as to whether the Elizabethan Act remained in force, however, the 1664 Act confirmed that it was, and expanded it. This Act followed the Northern uprising which, some Anglican royalists believed, had shown Presbyterians as differing not only through religious conscience but as 'dangerously anti-monarchical.'³³⁵

It contained twenty sections (as summarised below.) It was effective from 1st July 1664, and prohibited *any Assembly, Conventicle or Meeting* [of five or more people] *under colour or pretence of any exercise of religion in any manner than is allowed by the liturgy or practise of the Church of England.*

³³¹ This is an under-estimated aspect of this Act in the general histories and in Besse. Quakers persistently wrote against oaths of all types, as is further discussed in Chapter Five. A local example of prosecution under this section is given in Chapter Four.

³³² This provision shows the influence of the Lords in the drafting of the legislation.

³³³ 16 Car II c4.

³³⁴ 35 Eliz c1.

³³⁵ Seaward (n324) 194.

Once again, this Act addressed *the growing and dangerous Practices of Seditious Sectaries and other disloyal persons who under the pretence of tender consciences doe at their Meetings contrive Insurrections as late experience hath shewed.*

Issues with the scope of this Act are highlighted in contemporary queries and the assize depositions that are cited in the following chapter.

The Act truncated procedures for conviction, dispensing with the need for a trial for first and second offences. It granted JPs greater powers and required them to record every offence on sworn proof by confession, oath of witnesses or notorious evidence, such record to stand as a conviction. The witnesses' oath was taken as sufficient proof without cross-examination.

Offenders were to be committed to gaol or house of correction³³⁶ without bail or mainprize for a maximum of three months unless they paid a fine of £5 for the first offence, or £10 for the second.³³⁷ Such fines were paid to the churchwardens for relief of the poor in the offender's parish.³³⁸ Section X made gaolers liable to a penalty of £10 if they freed prisoners.

Third-time offenders, upon indictment, even with a plea of not guilty, were committed to gaol or house of correction by the JPs until the next quarter sessions or assizes. Then, lawfully convicted male offenders were to be transported to the plantations for seven years, unless they paid £100 to be discharged.³³⁹

Treble costs were awarded for a failed challenge to the execution of the powers under the Act.

Section IX penalised an owner for permitting their *House, Outhouse, barne, or Room Yards, or Backside Woods or Grounds* to be used for a conventicle. This

³³⁶ Houses of correction were essentially controlled by JPs.

³³⁷ Freeholders or copyholders of estates worth over £5 were exempted.

³³⁸ Accounts of these fines, as well as queries on whether they had been duly used for that purpose, are shown in the Chapter Four. See also the example regarding churchwardens in Chapter Two.

³³⁹ detailed provisions concerned transportation.

expanded the scope of the Quaker Act 1662 by specifically prohibiting meetings at private premises.

Section XIII empowered JPs to use whatever force they thought necessary to execute the Act after refusal of entry to premises where they were informed a conventicle was taking place (with restrictions on peers' dwellings). The nature of such empowerment and force became the subject of intense legal debate.³⁴⁰

Refusal of oaths³⁴¹ *to obstruct the proceedings of justice* was singled out under section XVI in a measure **separate**³⁴² to attending conventicles. This was to be recorded, such record to stand as conviction.³⁴³ This penalised Quakers for not giving sworn evidence against Friends. The penalties were the same as those for attending unlawful conventicles. Section XVII provided a specific oath to discharge this offence: *I doe sweare that I doe not hold the taking of an Oath to be unlawful nor refuse to take an Oath on that account.*

The only limitations were that prosecution had to be instituted within three months and simultaneous punishment under another Act was prohibited.

The Act remained in force for three years, until the end of the next parliamentary session thereafter. This Act would have expired circa 2nd March 1669.³⁴⁴

The Conventicles Act 1670. ³⁴⁵

The third Act, which was effective from 1st May 1670, was a reinforced Act to prevent and suppress seditious conventicles. It was passed, after criticism by both Quakers and non-Quakers, in the bitterest period of opposition to dissent.

The preamble repeated the growing, dangerous practices of seditious sectaries under 'pretence of tender conscience' contriving insurrections at meetings. It,

³⁴⁰ For detail, see Chapter Four which looks at the practical implementation of these Acts.

³⁴¹ when summonsed as a witness or jury member, or ordered to be examined upon Interrogatories, to a suit in any Court of Record, Equity or ecclesiastical courts.

³⁴² My emphasis.

³⁴³ except in the minor courts leet.

³⁴⁴ Braithwaite (n313) 53 note 1.

³⁴⁵ 22 Car II c1.

again, authorised JPs to record (and thus convict) all such records to be certified by them at the next quarter sessions.

Offences were punished on the same scales as the 1664 Act. JPs had discretionary power to levy distress from another person in the event of poverty of the convicted offender, to a maximum of £10. This implies that it was apparent, by 1670, that many of those convicted for attending conventicles were of very limited means³⁴⁶ and was probably an ameliorating provision against imprisonment for non-payment due to poverty.

Constables were required to levy fines on receipt of a sealed warrant. A third of the monies were to be paid to the King, via the sheriff, and recorded by the justices at quarter sessions as paid. This discharged the justices and the sheriff of their respective duties. Dual certification *not one without the other* had to be lodged in the Exchequer. The second third was appropriated for the poor of the parish and the final third to the informers whose evidence resulted in the discovery, dispersal and punishment.³⁴⁷

Section III imposed a fine, first of £20, and subsequently £40, against preachers at conventicles. If they could not be found,³⁴⁸ the justices could levy this against anyone present. A householder was again fined £20.

Section VIII amplified the earlier Act's provision that JPs could break open and enter premises to prevent or disperse conventicles if access was refused to constables under warrant, with whatever force and assistance they thought fit.³⁴⁹ This became controversial. Lord Lieutenants, deputies and JPs could disperse meetings by any means, with restriction in relation to peers.

³⁴⁶ The recorded sufferings, and additional local sources cited in Chapter Four, show this.

³⁴⁷ There is an example of Quakers checking this distribution in the local cases.

³⁴⁸ A measure against non-conformist preachers, many of whom were inevitably itinerant (See Chapter Two.)

³⁴⁹ See Appendix for the complete wording. Issues about the scope of this provision are illustrated in the following chapter.

Section VI introduced appeals. Once a fine was levied, a written appeal could be lodged with the convicting justice within one week, returnable at the next quarter sessions. It was a condition that the appellant entered into a recognisance with the convicting justice or else the appeal was null and void. The justice had to return the fine and certify, in writing under seal, the evidence upon which the conviction was passed, the whole record and the appeal. The offender could plead his defence and be tried by jury. That was a final determination. Treble costs would be awarded against anyone who unsuccessfully challenged the actions of JPs or constables.³⁵⁰

Constables and churchwardens were liable to a £5 fine for neglecting to convey credible information of conventicles within their parish to the JP and endeavour the conviction. A JP who failed could be fined £100.

Section VII stated that the Act was to be construed for suppressing conventicles and no warrant, mittimus or record made by virtue of the Act should be void for error in form. This was designed to prevent the traditional route of appeal by writs of error. The two limitations in the 1664 Act were repeated.

JPs were empowered to certify the conviction of anyone who fled to another county so that the penalty could be levied there. The £5 or £10 penalty imposed on a married woman could be levied against her husband.

The ostensible aim of the Act was to ‘encourage’ conformity.³⁵¹ Fleming refers, to *some conformed*.³⁵² A Westmoreland controversy concerned some Quakers who wanted to hold their meetings secretly, contrary to their leaders’ admonitions. The Swarthmore Womens’ Meeting Minute book contains George Fox’s:

Our open Testimony or Publique Meeting in times of Suffering – open and known meetings against the spiritual persecution – not decline, forsake or renounce their publique assemblies because of times of sufferings as wordly

³⁵⁰ Two local examples are provided in Chapter Four.

³⁵¹ See also Archbishop Sheldon’s letters cited in Chapter Two.

³⁵² WDRY/5/601 quoted more fully in Chapter Four. This appears to have been after at least one offence was committed and, presumably, was at the prospect of further severe penalty.

fearful and pollitique persons have done, because of Informers and like persecutors. ³⁵³

It is not possible to show how many were deterred from meeting, since scant such records exist, and Quakers were ill-disposed to record these.

However, conformity was to be achieved by coercion, and Quakers would not be coerced. Their collective response to the legislation was to flout it. Milton remarked:

*You may break in upon them ... Throw them out at the doors ... they but re-enter at the window and quietly resume their places. Pull their meetinghouse down and they re-assemble next day ...amid the broken walls...there they sit...musing immovably among the rubbish...They held their meetings...without the least concealment, keeping the doors purposely open that all might enter, Informers, constables or soldiers...*³⁵⁴

Consequently, they were exposed to the full range of penalties in the Acts.

In this section we have seen how the common law restrictions upon assemblies of people were expanded by statute in order to incorporate the terms of the Act of Uniformity, to adapt to the persistence of “conventiclers” and to address the fear of sedition. The question of how Quakers were perceived as seditious is examined more closely in the next section.

3. Perception

Introduction

In May, 1660, the newly crowned Charles had authorised the release of Quakers who had been imprisoned following the rebellion earlier that year. In Cheshire, Alexander Parker, and, in Lancashire, George Fox ‘*an Enemy to our Sovereign Lord the King and the chief upholder of the Quaker sect*’³⁵⁵ had been seized.

³⁵³ BD Swarthmore MM (women) 1671-1700. Cumbria Archive, Barrow-in-Furness.

³⁵⁴ cited in Braithwaite (n313) 21.

³⁵⁵ Barry Reay ‘Authorities and Early Restoration Quakerism’ (1983) 34 *Journal of Ecclesiastical History* 69-84.

On 3rd January 1661, Lord Langdale wrote to Secretary Nicholas concerning *a sect of persons, called Quakers, who hold meetings in several parts, and lead most exemplary lives, accounting persecution an honour...* asking how the King wished them to be dealt with and whether they fell within the King's last concessions.³⁵⁶ Then, on 6th January 1661, a Fifth Monarchist uprising 'electrified the country,' as sensationally reported in an oft-cited entry:³⁵⁷

On Sunday, 50 Fifth monarchy men ...demanded keys to St Pauls... broke open door ...shot man who said he was for King Charles to which they replied they were for King Jesus ... returned to city on Wed with mad courage... beat the Life Guard, and a whole regiment in half an hour, refusing all quarter. Venner, their captain, was taken with 9 more and 20 slain...

The government, unsurprisingly, concluded that its position was not secure. This attack was taken to threaten the Restoration itself. All sectarians were implicated in the Venner uprising. There were between 20,000 and 30,000 Baptists, 10,000 Fifth Monarchists and, according to Greaves,³⁵⁸ 'an unknown but substantial number of Quakers.' Slater³⁵⁹ estimates that there were 2,000 former republican officers in England in 1660.

Consequently:

*...No man is now allowed to have arms, unless registered; nor to live in the city without taking the oath of allegiance; not to exercise religious duties out of his house; nor to admit others into it under penalty of a riot. This troubles the Quakers and Anabaptists, who had nothing to do with this business.*³⁶⁰

Finch acknowledges here that Quakers and Anabaptists would inevitably be subjected to penalties because they would not swear oaths,³⁶¹ and they would be impeded from meeting.

³⁵⁶ Calendar of State Papers (n329).

³⁵⁷ Sir John Finch to Lord Conway, cited in Victor Slater, *Noble Government, The Stuart Lord Lieutenancy and the Transformation of English Politics* (The University of Georgia Press 1994) 98.

³⁵⁸ Richard L Greaves, *Deliver Us from Evil* (Oxford University Press 1986) 10 (as quoted by Slater, *ibid* 96).

³⁵⁹ Slater (n357) 96.

³⁶⁰ Calendar of State Papers (n329) 11th January 1661.

³⁶¹ Chapter Five looks at the consequences of their refusal to swear oaths.

Government anxiety regarding religious meetings was recorded in the State Papers for 10th January 1661 where it was observed that: *The pulpit blows sparks, and it is common discourse that the government will not last a year.* ³⁶²

Quakers did not disassociate themselves from such sentiments and there was great anxiety as to how they should be dealt with. From Yorkshire, Lowther observed to Secretary Nicholas: ³⁶³

... the discontented men grown more bold and abusing their liberty. In all the great towns, Quakers go naked on market days...crying "Woe to Yorkshire" and declare strange doctrine against the government, some officers being amongst them.

This resulted in an Order at Wakefield Sessions

forbidding the holding of large public meetings in the West Riding, by Quakers, Anabaptists, and others who disown magistracy, declare blasphemous opinions, and try to seduce liege subjects to disturb the peace. Justices of the Peace are to cause offenders to give security for good behaviour, or commit them to gaol. Jan.11. 1661.

The local initiative was followed by the King's Proclamation against Conventicles in January 1661. Yet, Quakers carried on with religious meetings. Therefore, around 4,000 of them, nationwide, were imprisoned in that year. And so, from the outset of the Restoration, there was intense concern that the problems of the previous decades were about to be re-ignited.

The foregoing extracts set the context for the crucial problem that was encountered by Quakers in relation to their desire to meet for worship. Next we will consider their insistence that such meetings were entirely innocent.

The "Harmless and Innocent People of God."

In order to evaluate early Quakers and their historians' attribution of the proscription of their meetings to religious persecution, this section examines the

³⁶² Letter from William Delavalle to Edward Gray, Gateshead, 10th January 1661, Calendar of State Papers (n329).

³⁶³ Calendar of State Papers (n329).

extent to which their declarations of peace and innocence accurately reflected innocent behaviour. It provides a more rounded context for the use of the law to restrict their meetings in the context of the evidence of political instability connected to the religious sectarianism discussed above. Even the Quaker historian, Braithwaite acknowledged:

*It is only fair to remember that political fear of (the perils of religious division) played a larger part than mere bigotry in shaping the persecuting laws of the Restoration that are known as the Clarendon Code.*³⁶⁴

Reay³⁶⁵ acknowledges a 'lack of unanimity' in the development of Quakers' peace testimony. They had issued two earlier statements:³⁶⁶

23rd November 1660. *Proffer made by the Quakers, that to avoid all jealousies and for preservation of peace, six of their number in each county, God – fearing and sufficient men, shall engage that their meetings be kept free from plots, insurrections.*

This is tantamount to admitting that their meetings had not always been free from plots or insurrections!

December 1660. *Declaration made by the Quakers of England – because their conscience does not allow them to swear, and therefore, they may be liable to be misunderstood and persecuted – that they acknowledge Charles II as rightful supreme magistrate, will yield him due obedience in the Lord, will not conspire against him or the peace of the kingdom, but if anything be required of them contrary to their conscience, will rather suffer than sin by resistance...*

A clearer statement of loyalty but ambivalent as to the extent to which they would be willing to constrain their actions to allow them freedom of manoeuvre.

Quakers more particularly relied upon the Declaration that their leadership issued on 21st January 1661, which positioned them away from sectarian

³⁶⁴ Braithwaite (n313) 7.

³⁶⁵ Reay (n355).

³⁶⁶ Calendar of State Papers (n329).

fighters. It was pronounced, **after** ³⁶⁷ Venner's uprising, and the King's Proclamation. They intended this to be one of their defining features and they cited it as evidence of their 'innocence' which, as noted in the introductory chapter, ³⁶⁸ was rhetorical.

'A Declaration from the Harmless and Innocent People of God, called Quakers, Against all Plotters and Fighters in the World for the removing the ground of jealousy and suspicion from both magistrates and people in the kingdom, concerning wars and fightings; and something to answer to that clause of the King's late Proclamation which mentions Quakers, to clear them from the plot and fighting which therein is mentioned, and for the clearing their innocence.'

³⁶⁹

This could not necessarily control the former soldiers, some of whom may have regarded the Declaration as a volte-face. The government was not convinced and, contrary to the said Declaration, extracts from state papers and the local sources described below, reveal that Quakers did not take steps to eradicate all suspicion. Such suspicion was not simply a manifestation of localised antipathy or religious prejudice towards them because the combination of sources indicates that Quakers failed to distance themselves physically from seditious activists, or ideologically from certain extreme viewpoints. State papers show:

21st January 1661:³⁷⁰

In searching for arms at a Quaker's house in Holderness, seditious papers were found, by which it appears that they have constant meetings, intelligence all over the kingdom, and contributions to carry on their horrid designs, under pretence of religion. They also keep registers of all affronts done to them, and are an active, subtle people. Will be careful to prevent unlawful meetings and break the known of them in town and country.

8th May 1661:³⁷¹

³⁶⁷ My emphasis.

³⁶⁸ Madeleine Ward, 'Transformative Faith and the Theological Response of the Quakers to the Boston Executions' [2016] 21/1 Quaker Studies 15-32 (footnote 73).

³⁶⁹ Braithwaite (n313) 9-10.

³⁷⁰ Hildyard to Cobb, Calendar of State Papers (n329).

³⁷¹ Calendar of State Papers (n329).

*Examinations of Tracey and 3 others concerning seditious papers printed in Holland... They plead ignorance of the contents and have done nothing to disperse them. With note that the papers were against the oath of allegiance and were dispersed by Quakers.*³⁷²

There was a suggestion³⁷³ that Quakers were recruited by Baptists *to ioyne in outward things to spirituall good* but refused to use *carnall weapons*. They also associated with Fifth Monarchists as the following indicates:

On 22nd July 1664:³⁷⁴

...The desperadoes are gone into the country to keep sparks alive; ...His Majesty should be careful as the scope of their propheties is the death of the King and the downfall of the Bishops. The sects mingle more than before, and even with the Quakers who differ so much from them.

It is clear that, locally, Quakers were lumped together with other sectarians. Peter Leycester,³⁷⁵ wrote:

1662 A catalogue of all the Papists, Quakers and other Sectaries (by other sectaries is understand all such as enemies to our government by Bishops refusing to heare our Common prayer booke read, and are not conformable to the Ceremonies of our Church of England, whether Independants, Anabaptists or Presbyterians)...

Royal Policy Vacillation

The Declaration of Breda had promised religious tolerance.³⁷⁶ This elephant in the government's room most likely inhibited them from full-scale action against non-conformists:

20th June 1664:

³⁷² Quakers continued to publish against oaths throughout the Restoration and in contravention of one of the provisions of the Quaker Act as discussed below.

³⁷³ SP/29/78/6 cited in Richard L. Greaves, *Deliver us from Evil, The Radical Underground in Britain 1660-1663* (Oxford University Press 1986) 179.

³⁷⁴ Lord Belayse to Secretary Bennet, Calendar of State Papers (n329).

³⁷⁵ one of Cheshire's Deputy Lord Lieutenants and a JP, Leycester was a royalist who fought in the Civil War and was rewarded with a baronetcy on the Restoration.

³⁷⁶ See introductory chapter.

*The Quakers, Anabaptists and 5th Monarchy men will meet more daringly after the time limited in the Act,³⁷⁷ and say they will neither pay money nor be banished. They have solicited others of different persuasions to join them in opposing the act, and they get encouragement though not promises. If dealt with severely, a body of 10,000 would rise and demand fulfilment of the King's declaration for liberty of conscience... Other sectaries resolve to keep to the limits of the Act, and increase their numbers, as they can safely. The hopes of wars with the Dutch, fermented by spies at Court, dispose the desperadoes to dangerous resolutions.*³⁷⁸

Accordingly, the Declaration of Breda's caveat *which do not disturb the peace of the kingdom* was carefully reasserted in the recitals to the King's Proclamations and legislation against meetings of non-conformists.

There were frequent changes in royal policy towards Quakers which were conveyed by communications emanating from the centre to the counties. Royal Proclamations against conventicles and, conversely, orders for leniency were first given, usually by the Privy Council, to the Lord Lieutenants for dissemination by their deputies and JPs, and then by way of instruction to High Constables and other law enforcement officers. Local observations on the effect of royal policy can be seen in the following correspondence between Fleming and Dr Thomas Smith:³⁷⁹

the Quakers and other Phanaticks are grown impudent upon the King's last Declaration and promise themselves great liberty from this next meeting of the Parliament.

Leycester's papers³⁸⁰ contain a rarely cited King's Proclamation dated 17th January 1661: *Prohibiting the Seizings of any Persons or Searching houses without warrant except in tyme of Actuall Insurrection*. Whilst it acknowledged the difficulties that those responsible for law enforcement had due to the

³⁷⁷ This refers to the 1664 Conventicles Act which was shortly due to expire as discussed below.

³⁷⁸ A letter to Williamson, Calendar of State Papers (n329). Braithwaite (n313) mentions an earlier instance in the Durham uprising at the end of 1662 which concerned enforcement of the Declaration of Breda and other grievances.

³⁷⁹ WDRY/5/530 (Cumbria Archive, Kendal).

³⁸⁰ DLT/B11 (Chester Archive).

restless and perverse dispositions of certain unreasonable men ...that they have ... actually begun levying a warre and the revival of those differences and divisions...

it contained, in strong terms, clarification of their authority, insisting upon restrained action according to established principles of law.³⁸¹ The salient parts³⁸² are:

...during those late commotions, severall persons have been imprisoned by soldiers and others, their houses searched and their goods taken away without lawful authority, and ...opprobrious words ...of dissension and discrimination of parties have been said and given to our great disservice, contrary to the aforesaid Act of Oblivion...

Those are therefore strictly to charge and command all officers, soldiers and others (except upon inevitable necessity and actual Rebellion or Insurrection) to forbear to molest or trouble any of our good subjects... or seize... persons or estates... without a lawful warrant of Privy Counsel, Lord Lieutenants, Deputy Lord Lieutenants or JPs. ...

...those who shall hereafter be so hardy as to offend against this our Proclamation, shall not only not receive countenance from us therein but shall be left to be prosecuted against according to our Laws and incur our high displeasure, as persons doing their utmost to bring scandal and contempt upon our government.

This restraining order did act as a brake for some, according to the sources cited below.³⁸³

However, Sir Philip Musgrove said, in 1663, that he *would rather be in the King's mercy for some irregular proceedings than hazard the peace of the kingdom by too strict an attendance on the rules of law.*³⁸⁴ This statement highlights a perceived

³⁸¹ The extent to which individuals may have exceeded their authority is also discussed in the next chapter which examines how they worked in practice.

³⁸² The full text is contained in the Appendix.

³⁸³ Serious errors on the part of judges involved a humiliating disciplinary procedure as experienced by Chief Justice Keyling in 1677 following his unlawful fining of a grand jury for not finding an indictment for murder. He was brought on his knees to the bar of the House of Commons.

³⁸⁴ quoted in Slater (n357) 102.

conflict between the legal framework for taking action and the professional duty to suppress insurrection. The local examples cited in the next chapter further illustrate their dilemma.

Charles II issued *A Proclamation for Inforcing the Laws against Conventicles and for the Preservation of the Publick Peace against Unlawful Assemblies of Papists and Non-Conformists* on 10th March 1667.³⁸⁵ This refers to Common's petitions and *abusing our clemency*. Lieutenants, justices of assize and gaol delivery, JPs etc were commanded to execute all laws against *Unlawful assemblies of Papists and Non-Conformists*.³⁸⁶

Privy Council orders for leniency to Quakers are recorded in the Lancashire Deputy Lord Lieutenant's log. An order to the JPs of the County Palatine of Lancaster dated 10th December 1667³⁸⁷ refers to His Majesty's enquiry into the gaols and prisons of the kingdom, quarter sessions, and *particularly that sort of peoples called Quakers... To restoring them to profitability...who of them may be fit objects of his Majesties' mercy...*

On 16th July 1669 a further proclamation against conventicles was issued on the expiry of the 1664 Act.

The Mayor of Chester's papers³⁸⁸ contain the following, *from the Court at Whitehall the 29th day of March 1672* which was issued at around the time of the King's ill-fated 1672 Declaration of Indulgence

... Whereas Request hath been made unto his Majesty in behalf of the Quakers who Remain at present in severall Gales and Prisons of this Kingdom that his Majesty would be pleased to extend his mercy towards them and give Order for their Release. Which his Majesty taking unto Consideration hath thought fit in order to his clearer information before he

³⁸⁵ Broadside 128 (Quaker archive).

³⁸⁶ The equating of Catholics with Protestant non-conformists had serious repercussions as discussed in Chapter Six.

³⁸⁷ GB127 L1/40/1 (Manchester Archive).

³⁸⁸ ZM/L/3/486 (Chester archive).

Resolve anything therein, to Command us to write these our Letters unto you. And accordingly, we do hereby will and require you to procure a perfect List or Callendar of the Names, Times and Causes of commitment of All such persons called Quakers as are remaining in Prison in the Citty and County of Chester...

The Declaration of Indulgence, which allowed a short hiatus when Quakers could meet, was followed, locally, in practice (although Fleming noted in a 'Memoranda' in 1671 a 'seditious conventicle' at Holmes' house).

The General Pardon³⁸⁹ that was issued on 12th June 1672 is summarised as follows:

to Quaker prisoners for all offences, contempts and misdemeanours by them... committed before the ...day of... last against severall statutes, in not coming to Church and hearing divine service, in refusing to take the oath of allegiance and supremacy and frequenting seditious conventicles and of all praemunire judgement, convictions sentences and excommunications etc.

³⁹⁰

In order to appreciate the practical impact of these upon Quakers, it is important to note the constitutional legal framework that applied to the King's initiatives. In general, the Crown's proclamations aimed to enforce the law and declarations expressed aspirational policy.³⁹¹ Since at least Charles I's time, Parliament was keen to limit and control royal prerogative in so far as it bypassed them. In other words, the King did not have the legal power (so Parliament argued) to enforce toleration of religious dissent by means of Declarations of Indulgence or pardons without their endorsement. Nenner traces this at high policy level.³⁹² Hale advised that the King could only 'pardon those offences of the highest nature, as

³⁸⁹ Note that this was in addition to the Declaration of Indulgence. I think that they are sometimes loosely described so that they become conflated.

³⁹⁰ Book of Cases, YM/MfS/BOC/1 1661-1695 (Quaker Archive).

³⁹¹ Craig Horle, *Quakers and the English Legal System, 1660-1685* (1st edition, University of Pennsylvania Press 1988) 37.

³⁹² Howard Nenner, *By Colour of Law, Legal Culture and Constitutional Politics in England, 1660-1689* (The University of Chicago Press 1977). See in particular, Chapter 4, *The Instruments of Control*.

against his own suit, though not against the suit of the party.’³⁹³ Thus, the 1672 General Pardon distinguished between public and private law.³⁹⁴ The King did not purport to release those excommunicated and imprisoned for non-payment of tithes, those subjected to private suits in the Exchequer or for failure to pay fines due to individuals. It did, however, apply to those convicted for meeting for worship contrary to the Conventicles Acts:

Which being this day taken into Consideration his Majesty was graciously pleased to declare, that he will Pardon all those persons called Quakers, now in prison for any offence committed relateing only to his Majesty and not other prejudice of any other person.

Consequently, Quakers only profited from the various ‘Indulgences’ to a limited extent, both because of their short duration and their precisely drafted terms.

In February 1676, a further order in council directed the strict enforcement of the laws against conventicles and popish recusants. This resulted in savage persecution under the Elizabethan and Jacobean legislation. A Lancashire JP, Kenyon³⁹⁵ recorded the Privy Council order of 20th April 1683 in his papers. When compared to the database, this order appears to have reduced rather than stopped local proceedings altogether.

The furtherance of efforts towards toleration from heavily opposed Members of Parliament and the Lords, as well as Quakers and other dissenters’ petitions for changes in the application of certain laws, was also impeded by the cessation of parliamentary sessions. This, especially towards the end of the reign when Charles was negotiating the Exclusion Crisis,³⁹⁶ affected the progress of bills for toleration and also, an important legal recognition that Quakers should not be

³⁹³ Sir Matthew Hale, *Preparatory Notes touching the Rights of the Crown* (Lincoln’s Inn, Hargrave MS 9 Ch 12, 95) quoted in Nenner, *ibid* 88.

³⁹⁴ The General Pardon is set out in the Appendix.

³⁹⁵ DDKE/HMC/527.

³⁹⁶ The attempt to exclude Charles’ brother, the Catholic James, Duke of York from the throne after Charles II’s death.

treated as popish recusants.³⁹⁷ Eighty-two per cent of unsuccessful bills concerned religion, during the reign as a whole.³⁹⁸

The fluctuation in attitudes towards dissent through the Restoration affected how Quakers were treated and, consequently, whether or not their meetings for worship were tolerated.

The Nature of Quaker Meetings

Quakers refused to worship in churches and held their own separate meetings at the homes of individuals, in barns, yards or out in the open. Typically, there would be a speaker or preacher, and individuals, including women, could minister, but the essentially silent nature of Quaker worship was well-established by 1664.³⁹⁹ Meetings were of indeterminate length, (typically around three hours) as people gathered together to wait in silence until moved by the spirit. As Dandelion pithily explains,⁴⁰⁰ silence was adopted as the medium through which to experience God's revelation. Although their ostensible purpose and nature was worship, given this silence, it was hard for those concerned with enforcing the laws prohibiting meetings to determine if they fell foul of the statutory definition in the Conventicles Acts.

Quakers also met at night on occasion. This invited suspicion in the prevailing climate, arguably offset by the fact that their meetings were open. Grounds for suspicion that the meetings were unlawful, particularly after their corporate Declaration of 21st January 1661, are debateable, but the notion that meetings were seditious prevailed. In 1664, Sir Matthew Hale held that if no seditious

³⁹⁷ This fell apart in the aftermath of the Titus Oates Plot, as described in the dissenting tract *Tam Quam* which is discussed in detail in Chapter Six.

³⁹⁸ For a comprehensive analysis, see Julian Hoppit (ed) *Failed Legislation, 1660-1800* (The Hambledon Press 1997).

³⁹⁹ See, for example, Rosemary Moore, *The Light in their Consciences, The Early Quakers in Britain, 1646-1666* (University of Pennsylvania Press 2000) 142-154. This provides an interesting account of the early meetings.

⁴⁰⁰ Ben Pink Dandelion, *The Quakers. A Very Short Introduction* (Oxford University Press 2008) 10.

appeared under the exercise of religion the 1664 Conventicles Act did not apply.⁴⁰¹ On the other hand, Orlando Bridgeman directed a jury:

you are not to expect a plain, punctual evidence against them for anything they said or did at the meeting; for they may speak to one another, though not with or by auricular sound, but by a cast of an eye, or a motion of the hand or foot, or gesture of the body ...you must have respect to the meaning and intent of the Law... He explained that the law proscribed not merely conventicles but the words 'assembly' and 'meeting' were added; for we have late experience of the danger of such meetings under colour of religion, and it is an easy matter at such meetings to conspire and conduct mischief.

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Quaker historians, including Braithwaite have focused on the Act's reference to sedition, with which they rightly took issue where there was no evidence of such. However, ascertaining whether the meetings met the statutory definition was also connected to the issue of conformity with Anglican liturgy and practice.⁴⁰³ This had been made mandatory by the Act of Uniformity 1662. Quakers could hardly deny that their meetings were not under colour or pretence of religion, when they consistently asserted that they met to worship God. At common law, as noted in Section 1, these were lawful meetings.

Quakers did not assert a common law right to assemble together as such. This reflects Handley⁴⁰⁴ who states that '...the relatively late perception of a specific claim to freedom of assembly in England was caused by its being eclipsed by the right to petition...' ⁴⁰⁵

The Roles of Deputy Lord Lieutenants and Justices of the Peace

Introduction

I turn now to examine the roles of those officials whose actions have drawn the most criticism from Quakers. In an examination of localism, the roles of the

⁴⁰¹ Cited in Braithwaite (n313) 43.

⁴⁰² Braithwaite (n313) 43.

⁴⁰³ As discussed in Chapter Two.

⁴⁰⁴ Robin Handley, 'Public Order, Petitioning and Freedom of Assembly' [1986] 7 Journal of Legal History 123.

⁴⁰⁵ And it was given specific protection in the Bill of Rights of 1689. Handley, *ibid* 138.

Deputy Lord Lieutenants and justices of the peace are significant. Many of them believed it their professional duty to defend the Anglican Church.⁴⁰⁶

Once royalist Anglicanism became a pre-requisite for office, the political and religious beliefs of those concerned with law and order carried an inherent potential bias. This must have contributed at least to a perception of prejudice, and influenced the views both of contemporaries and later historians that many of the gentry were religious bigots. However, I contend that the actions of Deputy Lord Lieutenants and Justices of the Peace must be considered by reference to the legal context within which they operated, as should the views that they expressed in the sources set out below.

Deputy Lord Lieutenants (DLLs)

Slater⁴⁰⁷ asserts that a revised lieutenancy was vital to the success of the Restoration and, whilst in earlier periods they were concerned with local interests, following the Restoration, they became orientated towards the needs of the Crown.⁴⁰⁸ This re-orientation is relevant to their activities towards non-conformists, in so far as non-conformity might be anti-monarchical. Few prominent Presbyterians received appointments.⁴⁰⁹ In Lancashire, Sir Roger Bradshaigh and Colonel Richard Kirby opposed the Presbyterian DLLs proposed by the Cheshire and Lancashire Lord Lieutenant Charles Stanley, the Earl of Derby. Kirby was vehemently against Quakers and behind several high-profile prosecutions, including those of George Fox and Margaret Fell.

Although lieutenants were now chosen on the basis of loyalty to the King rather than pure social status, they were still drawn from large landholders and gentry. Daniel Fleming and Sir George Fletcher are two of the thirty-six specifically named in the Act as commissioners for the militia for the county of Cumberland

⁴⁰⁶ The Church traditionally asserted the same: 'The temporal sword should aid the spiritual sword,' Richard Helmholz 'The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s' (Oxford University Press 2004) (Oxford Scholarship Online) 27.

⁴⁰⁷ Slater (n357) 71.

⁴⁰⁸ Slater (n357) 68.

⁴⁰⁹ Slater (n357) 78.

and both of them were keen to rebuild their estates after the civil wars. Fleming and Thomas Braithwaite were also nominated for Westmoreland.

DLLs' records, which indicate a high degree of activity concerning Quakers, should be read in the context of the legislation relating to them. The combination of judicial and military office in the newly restored lieutenancies under the Act Declaring the sole Right of the Militia to be in the King, 1661,⁴¹⁰ as well as the fact that such powerful local officials were commonly landowners and justices of the peace meant that those charged with local security, cognisant of, and responsible for, preventing sedition were also involved in local law enforcement. Lord Lieutenants were placed in charge of the militia. Cromwell's New Model Army was disbanded.

An additional act, The Better Ordering of the Forces Act 1662,⁴¹¹ made further provisions, including being 'in readiness.' This empowered Lord Lieutenants to levy funds, pay spies and engage the assistance of magistrates and constables. The reason for this was to assert local control of defence, to stabilise the country after the civil wars and to address the fears that arose from the plots that bedevilled the Restoration. The Deputy's role was set out more clearly.

Plots

Whilst many suspected plots never materialised, those that did engendered a chronic state of tension at local and national level⁴¹² as the following examples show.

In Cheshire T. Leigh wrote to Col. Urian Leigh in 1662:⁴¹³

Base lies are spread of the King and government, just as of the late King, there is much running up and down, buying of horses and night riding. The Quakers meet more boldly than ever; so no lenity nor the civil power can restrain them, they must be governed by the sword.

⁴¹⁰ 13 Car II st.1 c.6.

⁴¹¹ 14 Car II c.3.

⁴¹² Richard L Greaves, *Deliver Us From Evil, The Radical Underground in Britain, 1660-1663* (Oxford University Press 1998) focuses on plots during the early Restoration.

⁴¹³ Calendar of State Papers (n329).

He continued, however, showing the stress that the situation was causing:

Would rather suffer a fine than be continued as sheriff another year, as it has almost broken him.

The Lancashire DLLs' log⁴¹⁴ contain the words 'suspicious', 'dangerous' and 'disturbances' in relation to gatherings of people that they witnessed. A reference to plotters in 1663 clearly referred to the Northern uprising.

In the early stages of the Restoration, these strongly influenced the legislation against meetings. This was despite the fact that some accounts of seditious activity were known to be exaggerated: thus, an address by the Earl of Clarendon to the House of Lords referring to plots was described as *specious*.⁴¹⁵ Reay acknowledges⁴¹⁶ that 'a few Quakers were involved in plots against the government' and 'it only needed to be a few.' The prominent Quaker, Francis Howgill, lamented from prison that the activities of those few had caused his downfall. Later in Charles II's reign, the Titus Oates and Rye House plots contributed to severe measures against Catholics and all Protestant dissenters.⁴¹⁷

The most apposite plot (for the purpose of this early section) was the 1663 Northern uprising in which local Quakers were implicated. On 27th July 1663⁴¹⁸ the Cumberland and Westmoreland DLLs reported to Sir Henry Bennett, Principle Secretary of State, seeking advice when the northern plot was brewing:

The Quakers and other separatists are Numerous and their meeting... Dangerous if by any insurrection an opportunity for mischief should be offered to them ... They abate nothing to their obstinacy especially the leading men amongst them.... Sir, you will very much favour us in advising ... your view for the way of our ... duty to the utmost of our power ...

Following the abortive Kaber Rigg plot in October 1663, in a well-known quotation, Fleming said that any further trouble would come from certain

⁴¹⁴ GB 127 L1/40/1 (Manchester Archive).

⁴¹⁵ House of Lords, *The History and Proceedings of the House of Lords From the Restoration in 1660, to the Present Time* (London 1742) Vol1 1660-1697.

⁴¹⁶ Reay (n355)70.

⁴¹⁷ Chapter Six deals with this in more detail.

⁴¹⁸ WDRY/5/561.

ministers, non-conformists and Quakers, in the borders between Cumberland and Westmoreland and Lancashire *where George Fox and most of his cubs are kennelled*. In November 1663, Musgrove said *The Quakers have had a deep hand in this plot for in all the examinations Wee Meet with them*.⁴¹⁹

On 14th November 1663 Fleming made clear that he regarded Quakers as insidious:

*Though at present these persons are not much regarded, yet I am confident the first reall danger wee shall bee in will bee from them: for they are persons y most numerous of any one opinion they are against us, of the closest correspondencies (keeping constantly their meetings weekly within 8 miles one of another throughout all this Country, if not England also) and they are such that will do mischief the most resolutely of any if Fox or any other of their Grand Speakers should but dictate it unto them, which some of them half threaten already. ... I hear from my Brother... in Lancashire... that all things are quiet there, only some of them have the same thoughts of the Quakers there, as wee have here.*⁴²⁰

Two Quakers, Faucett and Waller, were engaged as messengers *in the guise of woolmen* by a governor of Appleby Castle, Captain Atkinson, during a plan to free dissenting prisoners and seize Musgrove.⁴²¹

Daniel Fleming's account of quarter sessions dated 16th October 1665⁴²² refers to Quakers and the Dutch plot:

I would not tell you what...Intelligence those Fanaticks have, since you know it well enough... only this I shall acquaint with you that the Quakers in the north have one William Caton⁴²³ lying...at Amsterdam, who gives them (almost weekly) Intelligence of most transactions in the low countries ...many concerning themselves ...

⁴¹⁹ Quoted in Greaves (n412) 200.

⁴²⁰ SPD lxxxiii.98. Cal 1663-4, 340 cited in Norman Penney (ed), *Extracts from State Papers relating to Friends 1654-1672* (London, Headley Brothers 1913)177.

⁴²¹ Greaves (n412) 200.

⁴²² WDRY/5/5709 (Cumbria Archive, Kendal).

⁴²³ Caton was a well-known Quaker, close to Margaret Fell, with strong Dutch connections.

Within the foregoing contexts, a Privy Council's circular to the Lieutenants, instructed them to prevent illegal conventicles and watch 'the disaffected' closely. Lord Lieutenants, their deputies, JPs and sheriffs were required to dissolve or prevent conventicles, by going to them, if necessary, upon information that they were being held and take the *Leaders or Seducers* or others assembled, as they saw fit, into custody.

Prosecutors acted strategically, particularly following the activities of Quaker leaders, as Lord Clarendon and others urged. Fox survived repeated imprisonments but in the first half of the 1660s, many early northern Quaker leaders, including Edward Burroughs and Francis Howgill, had died in prison. This is not to say that the '*Leaders and Seducers*' were necessarily seditious – indeed, many of them had propounded the Declaration of Peace in 1661 – but they refused to conform. 'Ordinary' Quakers were encouraged to resist restrictions on meetings and to persist in refusing oaths of allegiance. Quakers continued to hold their meetings irrespective of their periodic prohibition. The spikes in seditious activity ran concurrently with Quakers' persistent refusal to comply. The ensuing clash with authority affected the majority of Quakers who were not involved in seditious activities.

Justices of the Peace

By the seventeenth century, JPs constituted the core of local government. County justices were commissioned under commission of the peace. The operative commission in the Restoration stemmed from 1559 but it underwent radical revision in 1660.⁴²⁴ There were also borough magistrates, and clerical justices. They also had a vital connection to their local communities and there was a political angle to the institution of JP in that 'they could influence votes cast by the electorate.' Many JPs, such as Fleming and Leycester, held other roles, including that of Deputy Lord Lieutenants.

⁴²⁴ Norma Landau, *The Justices of the Peace, 1679-1760* (University of California Press 1984) 72.

Justices could act together as 'double justices.' Landau says, the power of the double justice was crucial in local government, although it was not formally legally defined.⁴²⁵ It was, however, a legal requirement, in relation to penalties for tithes,⁴²⁶ and meetings under the Conventicles Acts. Consequently, justices liaised with each other. This was important in a local context because of the familial relationships of many justices, the Anglican conformity as stipulated by the Act of Uniformity, and the concomitant political allegiances of the Restoration period.

Hay says that 'low justice was the creation of unpaid amateurs.'⁴²⁷ JPs were only paid their prescribed fees and costs. This reflected the notion that they were upright and sufficiently wealthy to resist financial temptation. They swore an oath⁴²⁸ in respect of their duties, which included doing *equal right to the Poor and to the Rich*.

Some legal education was expected⁴²⁹ but this was not mandatory. Manuals, such as Dalston's *The Countrey Justice*,⁴³⁰ were available. Despite the fact that they did not necessarily have formal legal training, they were responsible for carrying out preliminary enquiries into criminal offences, conducting committals, and conducting proceedings before juries. They were judges of record.

JPs had a wide discretion over whether and how they brought or conducted proceedings. This was a point that their Quaker critics used against them 'It is well known... that the hardships suffered by Friends often resulted from the whim, fancy or even the personal dislike of the magistrates before whom Friends

⁴²⁵ Ibid 28.

⁴²⁶ See Chapter Seven.

⁴²⁷ Douglas Hay, *The English Magistrate and the King's Bench, 1760-1800* in Norma Landau (ed) *Law, Crime and English Society, 1660-1830* (Cambridge University Press 2001) 20.

⁴²⁸ For a discussion of the importance of such oaths, see Chapter Five.

⁴²⁹ Fleming and Leicester had both trained at Grey's Inn.

⁴³⁰ Michael Dalston, *The Countrey Justice: containing the practice of Justices of the Peace out of their Session* (London 1618).

were brought.’⁴³¹ It is important, therefore, to understand both the extent and constraints of their powers.

There was relatively little judicial supervision, except at bi-annual county assizes. They were subject to review, and punishment, by King’s Bench Judges if criminal informations were brought against them. Writs of mandamus, to compel performance, and certiorari, to quash an action, were also available.⁴³² In the event of wrongful imprisonment, a defective warrant (such as not stating the amount of a fine upon which a prisoner was convicted) could be quashed under habeas corpus. However, a defective conviction had to be quashed through certiorari before the plaintiff could be released through habeas corpus.⁴³³

By the eighteenth century, Hay⁴³⁴ says that it was clear that JPs were allowed considerable leeway, and there was a culture of tolerance towards ignorance, mistakes, and abusive conduct. The national and local sources that are cited in the next chapter cast doubt upon this ‘culture,’ at least in the mid-seventeenth century, since they demonstrate how individual abuses were questioned. It may be more accurate to cite the lack of means of formal redress for such behaviour. JPs encountered relatively few legal challenges. The enormous cost of a failed prosecution probably deterred challenges from most of the people who were subjected to doubtful decisions.

Landau’s comment that JPs in the period 1679-1760 were ‘virtually independent’⁴³⁵ is also inconsistent with the local and national sources that are discussed in the next chapter. Whilst she states that ‘neither...central government nor Parliament told them what to do...or even insured they acted at all’⁴³⁶ the sources reveal both concerns about the actions of particular

⁴³¹ Norman Penney (ed), *Extracts from State papers Relating to Friends 1654-1672* (Headly Brothers 1913) 6.

⁴³² Landau (n424) 345.

⁴³³ W Paley, *The Law and Practice of Summary convictions on Penal Statutes by JPs*, (London 1814) 210-211 (cited in Landau (n424) 345).

⁴³⁴ Hay (n427).

⁴³⁵ Landau (n424) 2.

⁴³⁶ Landau (n424).

individuals and concerns by JPs themselves as to how to effect the law, as well as legal advice and guidance provided directly to JPs from senior judges. Further, the legislation to suppress conventicles, set out below, contradicts her. It placed statutory duties upon JPs to suppress conventicles, on pain of a fine for neglect.

Quakers despised many JPs, believing that they did not carry out a godly judicial role to prevent evil. In the mid to late 1650s, Quakers delivered county-based lists of the names of those that they considered to be suitable for appointment as Justices.⁴³⁷ The Cheshire list, and similar ones for Westmorland, Cumberland, North Lancashire and Lancashire, are contained in the Appendix. The lists distinguish between *moderate men free from persecuting speret* and *wicked...cursed persecutors*. The very distinction indicates that not all of the then commissioned JPs were hostile.

Some of those named were already JPs and a few were Quakers. This implies that there were Quakers with sufficient means to qualify for commission as JPs. According to Reay, yeomen (of whom a large number were Quakers) held land worth 40 shillings. They were, then, theoretically, eligible, but, under the collective terms of the Clarendon Code they became excluded.

The respective attitudes of individual JPs for or against toleration probably remained consistent. The following, possibly sly, lament against JPs who were reluctant to enforce the law is from William Kirby to Kenyon, dated 7th April 1684⁴³⁸ when there was serious division between opponents and supporters of toleration of dissent:

...my nephew Kirby and myself ... putting the laws in execution; ...But while we struggle ... with loyalty and all integrity, to serve our gracious King... here is some of our neighbouring justices..., Mr. Rawlingson and Mr. Knipe, who refuse to join us in this good service, which makes both of us, and the King's business, very uneasy to our country ... and thought to be busy in that which is not required of us. I presume you will... have opportunity to wait on

⁴³⁷ Penney (n431) 358-359.

⁴³⁸ DDKE/HMC/574 (Lancashire Archive).

our worthy Chancellor ...and I intreat you will acquaint him with this matter, to whose great wisdom I shall humbly submit.

Both Knipe and Rawlinson's names were suggested in the Quakers' Lancashire list of moderate JPs.

I challenge the idea that JPs behaved in a completely arbitrary manner, although I acknowledge that several sources support Landau's statement that the justices' activity was 'an unusually direct reflection of their motivation.'⁴³⁹

Reay criticises Sir Peter Leycester's bias which manifested itself in the many proceedings that he brought against Quakers:

*'In 1668, Leycester told a grand jury Non-conformists were the main Occasion and drawers on of the late Rebellion, as is not unknown to most of us here present; by instilling seditious principles into the People from the pulpit.'*⁴⁴⁰

Leycester's antipathy is not disputed, but it was part of a larger concern for law and order and the perceived danger of allowing free meetings. The cited comment was in the context of a speech in favour of toleration of non-conformist ministers to the House of Commons by Colonel Birch (of Hertfordshire). The Lancashire JP Roger Kenyon garnered information about seditious conventicles to counter *Black Birch's* position.

Political addresses to grand juries were common,⁴⁴¹ although they formed one of the grounds of complaint about legal practice. Chapter Six discusses the dissenting tract *Tam Quam, An Attaint*,⁴⁴² which counters political addresses to the jurors. Pronouncements, such as Leycester's,⁴⁴³ in a public judicial arena reflected not only personal views but also centrally determined politics. They further illustrate the fact that the justices did not act autonomously so far as

⁴³⁹ Landau (n424) 2.

⁴⁴⁰ E M Halcrow (ed) *Charges to the grand jury at quarter sessions 1660-1677* (Chetham Soc., 3rd series, v 1953) 46 (cited in Reay (n355) 69-84).

⁴⁴¹ Landau (n424) 46.

⁴⁴² Anon, *TAM QUAM: OR AN ATTAINT Brought in the Supream Court of the King of Kings; upon the Statutes Exod 20 7 16 and Levit 19 12* (LONDON 1683) (Dr. Williams Library, Tracts 1641-1700).

⁴⁴³ *Charge to Grand Jury at Michalemas Quarter Sessions 1666 Nether - Knotsford* in Halcrow (n440).

Quakers were concerned. Leycester's address to the Knutsford grand jury concerned religious toleration:

Certainly Toleration of all Religions, will soon destroy the right Religion... No man's Private Opinion in the nicety of Religion, if he will keepe his opinion to himself, will ether throw him out of his liberty or estate: But it is the running into Parties by multitudes, which is a great disturbance both to our Church and State, it is this which our Governours ought Principally to provide against by severe laws: ffor every Party thinks their own religion best: and so must needs run into faction: And by these insolent runnings into Companies publiquely without Controwle, must needs at last bring Conspiracies and Rebellions against our present Government, if not timely suppressed: and therefore have need of sharp laws to curbe them....

His thoughts about the Quakers and the Conventicles Act were as follows:

There was an Act made lately against the Quakers 13 and 14 Car 2 ca.1. A silly Sort of People...never heard of amonge us until the late Rebellion of the Parliament ffostered them up, and gave liberty to all sects and schisms whatsoever: and then also when the Reines of all Government were let loose, increased other Sectaries, as Presbyterians. Anabaptists, Independant , and what not. So that the whole fface of our flourishing and most Aposticall Church of England was overspread, and almost defaced by them; till it pleased God to revive it againe by the restoration of his Majestie.

And then I say was this Act against the silly Quakers made, prohibitinge them all meetings above the number of ffive in order to religious worship not authorized by the Lawes of the Realme: whiles as yet more dangerous sectaries were not restrained.

Leycester's views can, accordingly, be distinguished from those of Fleming, who regarded Quakers as the most sophisticated and dangerous sect.

The social composition of grand juries, who were drawn predominantly from the landed classes, would likely have made them receptive to addresses that propounded government policy but there are instances, such as the one mentioned below, where the jury independently rejected indictments.

There is evidence for the manifestation of judicial displeasure over juries' verdicts. The extent to which judges could influence or interfere with grand juries was of course the issue in the landmark 1670 Bushell's case.⁴⁴⁴ This held that a jury could not be imprisoned for returning a verdict with which the judge disagreed.⁴⁴⁵ Juries could be attainted, and could still be fined for a false verdict, but the following local instance, summarised from Besse,⁴⁴⁶ illustrates Crosby's view ⁴⁴⁷ that the nature of juries was changing and jurors were becoming more confident of their individual conscientious act of judgement and in accordance with their oaths. Besse reported that on 21st October 1683, the Aldermen of Chester took ten persons out of a meeting and sent them to prison. When they were indicted at the next sessions, the jury found them not guilty. The Court rejected their verdict twice and sent the jury out again, but the jury persisted. The defendants were returned to prison until an adjournment of sessions two months later, at which they were not called. They were discharged privately by one of the original Aldermen, on their promise to appear at the next sessions; *but no farther Notice was taken of them*. It seems that the Alderman decided to call it a day rather than persist.

4. Conclusion

As we have seen, the political questions of dissent and hostility to religious toleration were addressed by the use of law.

In Section 3 I have alluded to policy vacillation because it is particularly pertinent to the periodic proscription of conventicles and problems were caused by the frequent changes as to whether they would be permitted or not. The effect

⁴⁴⁴ Bushell's Case (1670) 124 ER 1006.

⁴⁴⁵ This originated in the trial of the leading Quaker William Penn: The Trial of William Penn and William Mead, at the Old Bailey, for a Tumultuous Assembly (1670) 6 Cobbett's State trials (1661-78 Charles II) cited in Kevin Crosby 'Bushell's Case and the Juror's Soul' [2012] 33/3 The Journal of Legal History 252-290.

⁴⁴⁶ Besse (Sessions Trust 2008) 110.

⁴⁴⁷ Kevin Crosby, 'Bushell's Case and the Juror's Soul' [2012] 33/3 The Journal of Legal History 251-290.

of such vacillation also features in Chapter Six in connection with praemunire and acts against popish recusants.⁴⁴⁸

Whilst the Carolean legislation against meetings that has been discussed in Section 2 was contrived to enmesh Quakers, when looked at objectively, persecution under the law for meeting was not inevitable. In fact, Quakers courted some of it, as sources cited in the next chapter will show. The crucial problem for them was the lack of a legal structure to facilitate religious meetings outside the Church of England. They railed against this, both in terms of refusing to conform and in petitioning against the Acts. In their portrayal of such persecution, Quakers are as guilty of religious bigotry as those they accuse, in the sense that they abhorred Anglicanism and would not bow to the law that supported it. This reflects Saunders' statement that, in this period, all men held others' religious views in equal scorn.⁴⁴⁹

Hostility towards Quakers' religious meetings was reinforced, firstly, by events as the Restoration government and a precise form of Anglican conformity bedded in, and, secondly, as I have argued here, by their own behaviour. Therefore, the political concerns about the stability of the Restoration government were not allayed so far as Quakers were concerned because they continued to engage in behaviour that invited suspicion. Their reliance upon their 1661 declaration of peace and loyalty, set out in Section 3, as sufficient in itself was, thereby, undermined. Quakers were affected by perceptions of their meetings that did not accord with what they were doing, and by judicial interpretation of the Conventicles Acts as applying to their meetings.

As a counterpoint to the claim to innocence, the Quakers' methodical nature and their tendency to act passively under provocation, far from establishing them as no great threat to the existing order, actually caused some to view them as a

⁴⁴⁸ Other aspects of Quaker sufferings, notably tithes and pecuniary ecclesiastical offences, however, were not so affected by fluctuations in policy and, consequently, the issue of toleration of dissent has less bearing.

⁴⁴⁹ David Saunders, *Anti-Lawyers, Religion and the Critics of Law and State* (Routledge 1997) 8.

more subtle and formidable danger than Fifth Monarchists and others. Although this was certainly the case with some members of the North West establishment, such as Fleming, we have seen that local justices did not act arbitrarily in the light of the onerous statutory duties that were placed upon them, under the legislation that has been discussed.

This chapter explains the context for the local examples of the Conventicles Acts in operation. Letters such as Kirby's to Kenyon, as well as (by comparison) the Calendar of State Papers, indicate diffidence on the part of some, who more reluctantly applied the law against recalcitrant Quakers. This is especially so with regard to the poor ones (as we shall also see in the next chapter) rather than the *Leaders and Seducers* against whom both central and local government were more determined. The sources also demonstrate the royalist and Anglican allegiances, duties and attitudes that played a major part in the local experience of Quakers, as well indicating a degree of variance within the region. There was an inherent Anglican bias amongst local clergy and magistrates once the legislation determined adherence to the Church of England to be a prerequisite for appointment.

This chapter has also considered the legally defined professional roles of JPs and Deputy Lord Lieutenants in the context of criticism of their attitudes towards Quakers. This provides the background to an understanding of their own records referring to Quakers. The next chapter examines the practical operation of the laws against meetings and analyses local and comparative central sources to see what was actually happening during the implementation of the respective acts. It was this that gave rise to the strong complaints of persecution.

Chapter Four

SUPPRESSION OF MEETINGS IN PRACTICE

1. General Introduction

This chapter shows how the law against meetings operated in practice within the political and legal context that was described in Chapter Three.

As I indicated in Chapter One, the histories that have focused upon the more severe consequences of the laws against meetings have left unexamined the summary proceedings that the Conventicles Acts of 1664 and 1670 brought in. Spurr,⁴⁵⁰ referring to the 1664 Act, identified that one effect of placing the burden of enforcement on the local gentry and on single JPs outside of quarter sessions, was that this decentralisation and consequent lack of records obscured the impact of the Clarendon Code at local level. The second section of this chapter sheds some light on this, giving a sense of the scale and nature of proceedings for unlawful conventicles in the North West by cross-referring Besse's entries and the papers of local JPs. The rare occasions where the same instance occurs in both is revealing because it gives a clearer sense of the legal problems which Quakers presented. The third section discusses the legal issues that arose from the way in which the law was interpreted and operated.

2. The Nature and Scale of Local Proceedings for Unlawful Meetings

The Unreliability of Data

Six hundred and eighty-eight proceedings recorded in Besse between 1660 and 1685 were for meetings contrary to the Quaker and Conventicles Acts, or the Elizabethan and Jacobean legislation discussed in Chapter Three. The number of proceedings per year would naturally fluctuate according to activity but it surged

⁴⁵⁰ John Spurr, *The Restoration of the Church of England, 1646-1689* (Yale University Press 1991) 55.

in response to the enactment of the two Conventicles Acts, when seventy-four are recorded for 1664, thirty-five in 1665, and eighty-six in 1670. The numbers correspondingly dwindled following the King's various orders for leniency. For example, that there were no proceedings in 1667 or between 1671 and 1673.

Many prosecutions were for the 'combined offences' of failing to swear oaths and attending unlawful conventicles. I have tentatively identified the six hundred and eighty-eight proceedings mentioned above as those that appear to be solely for meetings.

The above figures, which stem from Besse's records, probably obscure the true volume of proceedings. There are two main reasons why this might be so. Firstly, upon indictment, defended cases under the Conventicles Acts were heard in quarter sessions or assizes. Unless the defendant recorded this as a suffering, such a case would not be captured in the minutes for sufferings or by Besse. Successfully defended cases are, similarly, unlikely to have been captured. An example of assize depositions, in which there is no recorded end result, is given below. Assize records are dispersed, incomplete, and cause lists would not necessarily identify the fact that the defendants were Quakers or that the case involved conventicles, and so finding comprehensive data is difficult. Secondly, a very high volume of summary proceedings is indicated from the personal records of local JPs. Besse certainly does not record every such instance, although reference to the individual local minutes for sufferings⁴⁵¹ shows more complaints.⁴⁵²

Local Records of Summary Proceedings

Sample records of summary proceedings in the North West, particularly those that were kept by the Mayor of Chester, Fleming and Leycester are discussed below, with the caveat that the latter two despised Quakers.⁴⁵³ Balanced against this is the fact that Quakers en masse refused to obey any restrictions on

⁴⁵¹ The Great Book of Sufferings Vol 1 (Quaker Archive, YM/MfS/GBS).

⁴⁵² As discussed in the Methodology (Chapter One).

⁴⁵³ I have not found similar local collections from JPs who were not antagonistic.

meeting, and both Fleming and Leycester were responsible for suppressing conventicles in areas of high Quaker activity. Whilst acknowledging that their antipathy may have caused them to be especially diligent, the purpose of citing these sources is that they indicate the scale of activity and some of the legal concerns, rather than the motivation of the prosecutors.

Fleming's papers⁴⁵⁴ include approximately 100 separate documents concerning a range of proceedings involving Quakers between 1663 and 1700. A box called Quakers Forms contains precedents. His meticulous records may represent good practice that happens to have been preserved rather than obsessive persecution.

Local records of summary proceedings typically comprise dates of the conventicles, lists of names, status, occupation, and fines imposed. The volume of proceedings, with their precise accounts, balancing fines paid against disbursements incurred for informers and constables, conjures up a cottage industry. Thus, Fleming's records contain:

Memorial on record of payment and delivery of fines totalling £77 10s 88d imposed 16.9.78 for conventicles contrary to the Act for suppressing seditious conventicles.

The account lists disbursements: *paid to the Informant £77 10s 00d and to such persons as were diligent and industrious in the discovery and punishing of the said conventicles.*

Receipts from the constables between November 1678 and April 1679 totalled £67 10s 6d and included Quaker fines after giving allowances to constables for collecting them. Total disbursements for the period January to April 1679 were the same, including payment to the Kendall quarter sessions, payments to the poor (from fines) and to the clerk to the justices. ⁴⁵⁵

⁴⁵⁴ Fleming's formal correspondence and papers are contained in *The Manuscripts of SH Le Fleming* (HMSO London 1890) (Historical Manuscripts Commission 12th Report) and are relatively well-known. This section deals with under-researched documents that specifically concern Quakers in the Cumbria archive, Kendal, under ref. WDRY.

⁴⁵⁵ WDRY 5 (Cumbria Archive, Kendal).

The Chester Mayor's papers list Quakers' names, occupations and fines imposed in the same format as records of people bound over to keep the peace and other routine magistrate records.

Many defendants' names recur, including that of the pugnacious Reynold Holmes,⁴⁵⁶ who lived at Loughrigg, across the road from Fleming's seat, Rydal Hall. The names of certain preachers (who were not necessarily Quakers but include itinerant non-conformist ministers) also recur.⁴⁵⁷

The combination of Besse's entries with records of conventicles, where occupations are given, incidentally supports the social historian Stevenson's view in Spufford,⁴⁵⁸ that most Quakers were drawn from a wide cross section of society, with a large number of yeomen, tradesmen and some professionals. For example: Fleming's 22nd July 1670 record of the fines and convictions of about 55 persons for being at a conventicle in Holme's house on 17th July 1670 records their occupations as: yeomen (the majority), one skinner, shoemaker, butcher, farmer, and one spinster, Isobel Forrest.

Conventicles in Cumberland, Westmoreland and North Lancashire

The Lancashire archive contains constables' presentments of Quakers at quarter sessions.⁴⁵⁹ A 1661 request to the justices of the peace for Wigan for reimbursement⁴⁶⁰ by a constable of Knowsley in respect of eight *persons (who go under the notion of Quakers) unlawfully assembled together ... and then brought before ... Norris, one of his Majesties' justices of the peace who committed them... to the gaol in Lancaster*. The names of twenty-one Quakers taken at Bickerstaffe in 1661 are also listed.⁴⁶¹

⁴⁵⁶ The Holmes family become a prominent local Quaker dynasty.

⁴⁵⁷ I have not attempted an analysis of the recurrent names because many names were common in the locality and also within families and so it is difficult to conclude they were one and the same. Also, some of the informers' names are the same as Quakers.'

⁴⁵⁸ Bill Stevenson, 'The Social and Economic Status of post-Restoration dissenters, 1660-1725' in M. Spufford (ed), *The World of Rural Dissenters 1520-1725* (Cambridge University Press 1995).

⁴⁵⁹ For example, QSP 245/29; 245/36; 245/24.

⁴⁶⁰ QSP 215/27.

⁴⁶¹ QSP 215/15.

Fleming's first account lists fines, totalling £14 15s 0d imposed on fourteen named Quakers in the January 1663 quarter sessions. Some fines were substantially 'mitigated' by him, and Matthew Hodgson was *forgiven* for having conformed. Most fines were 10s.

Musgrove complained⁴⁶² in mid-1663, that Quakers (or those he dubbed Quakers) met weekly in congregations of over 200 people. The following shows Quakers determinedly ignoring the Conventicles Act:

*The names of Quakers which met at Strickland Head on 7th, 14th, 21st and 28th August, and 4th September. 5 committed by order of sessions upon the 3rd offence, 4 committed for 5 months on the 2nd offence and remained 2 months more than their time for the Clerk of the peace fees, 3 committed on a sessions outlawry and refused to submit or traverse the Indictment and pay the Clerk of the Peace' fees. Kendal Quakers 6 committed by Alan Bellingham, D Fleming and others for refusing to submit or transverse their Indictments, 1 committed by Sir John Lowther Bt. For refusing to find security for his appearance and good behaviour.*⁴⁶³

1st November 1663 – Quakers arrested on the information of a James Russell, at the house of Benson, included Reynold Holme and 'Lancashire people'. Besse records differently for this period: on 8th November 1663 Bownass, Denkin, Bowman and Sourby were forced from a religious meeting and imprisoned. Two more meetings in November and meetings on 6th and 28th December had the same result.

Fleming's report of Lancaster Sessions, 23rd April 1664:⁴⁶⁴

Quakers refused the oath of allegiance the second time without submitting themselves...and still continuing prisoners there... also caused about 50 Quakers to

⁴⁶² Quoted in Richard L Greaves, *Deliver Us From Evil, The Radical Underground in Britain 1660-1663* (Oxford University Press 1986) 173.

⁴⁶³ D LONS/L/13/1/10 Lowther Papers (Cumbria Archive, Carlisle).

⁴⁶⁴ WDRY/5/601.

be indicted for writings upon the Quakers Act... Last Thursday, at the Town Sessions ... were six indictments upon the 35 Eliz.1 for conventicles ...Yesterday at our Sessions have for this County...indicted about 30 Quakers for writings...

He continues ... *some of these Fanaticks have of late conformed and foreborne writings, but the generality of them are still very persisting.*

This highlights the separate offence of 'writings' against oaths under the Quaker Act. It is not picked up by Besse or Horle but was sufficiently important to be included in the Act and for a large number of indictments on that ground. This entry also indicates readiness to use the Elizabethan Act in the North West.

Fleming's note dated 15th May 1664 refers to the Gaver Grigg constable taking ... *around 20* from a meeting at Reynard Holmes' house.

An example of thwarted sympathy towards poorer Quakers is given by Sir Roger Bradshaigh to Williamson:⁴⁶⁵

Sir Rob Bindlos secured twenty Quakers at a meeting; he would have freed many of the poorest sort, but they would not promise not to meet again, nor to reform, nor would take any oath, nor give security.

One can see from comparing these records that, on social and legal grounds, there were those, both nationally and locally, who insisted on caution, but, notwithstanding this, there were those with particular zeal in their proceedings against Quakers in excess of the efforts of their contemporaries.

On 13th January 1665⁴⁶⁶ Fleming reported a meeting of the Cumberland and Westmoreland justices at Penrith to agree a strategy, including whether or not to enforce particular Acts, against ... *non-conformists*. The report references conventicles and Quakers *growing in obstinacy since ...Mrs Fell came home. To give some check to their confidence my cousin Braithwaite ... has lately convicted*

⁴⁶⁵ Mary Anne Everett Green and Others (eds) *Calendar of State Papers, Domestic Charles II* (London: Longman, Green, Longman and Roberts 1860-1939) Vol. XC. 1664 Jan 5.

⁴⁶⁶ WDRY/5/5710.

severall ... for unlawful meetings and if this persists we shall proceed further against them.

Fleming's account of quarter sessions dated 16th October 1665: *Little in Appleby at last sessions save for many Demonstrations upon the new Act. But a little before there were 13 Quakers fined for a conventicle.* ⁴⁶⁷

Besse says:

John Beck, Mayor of Kendal, sent his officers to summon all the Quakers and other non – conformists in the Town, before him, but none appeared except 20 Quakers, 17 of whom he fined 3s each and ordered the other three, Thomas Holmes, Robert Barrow, and Brian Lancaster to be prosecuted on an old Indictment and committed them to prison.... ⁴⁶⁸

The JPs also issued warrants in connection with conventicles.

December 1665, a summons regarding conventicles under the seals of Fleming and Braithwaite:

Whereas we are informed that the...undernamed were lately at a conventicle ... contrary to the late Act of Parliament in that ... to give notice ... and there to show cause (if there are any).

On 8th September 1668, Fleming and Philipson, citing the 1664 Act, and a long list of names commanded constables, churchwardens...

every one of you ...fine, levy or take goods, chattels etc. Two strangers who were preachers fined 20s to be levied from the others but not more than 10s for the first offence.

A 29th January 1669 warrant to sheriffs, bailiffs and constables records conventicles *on Sunday night last.*

⁴⁶⁷ WDRY/5/5709.

⁴⁶⁸ Besse (Sessions Trust 2000) 17.

A scribbled note refers to a warrant issued in Kendal on 12th February 1669 regarding eighteen persons, *one very active in the late rebellion and a non-conformist*. The warrant was issued in respect of

an Assembly or conventicle of people who separate themselves from the established worship in disturbance of the peace of this kingdom and terror of his Majesties subjects who like not such works of darkness

at the house of George Archer of Kirkland...And also information that (amongst many more unknown persons) there were *riotously and unlawfully assembled... in contempt of his majesties late proclamation and contrary to several laws ...*

This is vague, and unlikely to have solely concerned Quakers, who were not known for riotous meetings. It indicates, firstly that Quakers were lumped together with other dissenters, and, further, that the warrant was deliberately drafted to encompass penalties for riot. At this point in time, the 1664 Act had expired and it appears that resort was being made to the common law and Elizabethan Acts against riot whilst the 1670 Conventicles Act was in gestation. It continued:

Forthwith command that you bring the said Archer and the several persons hereafter mentioned before us ... to answer ... and also (if they show not very good cause to the contrary) ...sufficient surety not only for their several and respective appearances at the next quarter sessions to be held at Kirby Lonsdale, but also for their good behaviour in the interim. Otherwise... you are hereby required to convey them to the common gaol of the said County ... prisoners until they be legally charged.

Quakers were commonly imprisoned without charge when they refused to give recognisance and because of the harsh provisions of the Conventicles Acts. It was not necessarily unlawful in itself but constituted suffering, given the condition of prisons and the length of time they had to wait until the next formal legal hearing.

The following address to the High Constables of Kendall and Lonsdale dated 7th August 1669, which preluded the 1670 Conventicles Act, indicates greater

activity by Quakers on the expiry of the old one and invokes the Five Mile Act 1665:

Information hath been given to his Majesty ...that those who separate themselves from the established worship and meet in greater numbers than formerly to such a degree may be a danger to the publick ... whereupon his Majesty has...issued...his Royal Proclamation against such conventicles. In pursuance whereof ...to command you forthwith ... your severall warrants unto all the petty constables within your several wards, ...requiring them to be ...active and diligent ...of all such ...conventicles and of all speakers ...therein, and if any non-conforming Minister,...or speaker be or shall come ...within 5 miles of any...corporation or borough ... in any unlawful assembly, conventicle or meeting ...or...teach any schools or harbour... any boards or tablers... the said petty constables ...give notice unto the next JPs of the names of all ... The said offenders may ... be proceeded against according unto law and ... fail not at your peril.

Fleming's report to Secretary Williamson on 19th August 1670 illustrates a close dialogue between local and central law enforcement:⁴⁶⁹

We have got our assizes over at Carlisle and Appleby without anything extraordinary in them... Your smart actings at London against Conventicles have give us so good an example, as we are following it in this County as well as we can. We have convicted many Quakers and ... their Friends... make some of them come to Church and ...will... (I hope) ...conform ... and after we have counted all Conventicles, the levying of 12s for every Sunday⁴⁷⁰ will I hope bring them to Church. It is clear that nothing will convince them of their errors so soon as the ... money from them, for a good part of their religion (notwithstanding their great zeal...) is tyed to their purse strings. If you can make good your ground at London against these Families and not be quite tyred out with them, I am confident we shall do well enough...since we now have made them give back already and doubt not in short time to rout them.

⁴⁶⁹ WDRY/5/5734 (Cumbria Archive, Kendal).

⁴⁷⁰ A reference to the Elizabethan Act for non-attendance at Church, which is discussed in Chapter Six.

By 1670, Quakers in the vicinity of Rydal had, perhaps, had enough of being caught. Section XII of the 1670 Conventicles Act, which provided for cross-county recovery of fines, appears to have addressed a real problem to which the next extract refers.⁴⁷¹ On 11th August 1670 Matthew Richardson, JP of Lancashire addressed to all constables, churchwardens and overseers of the poor of the parish of Hawkshead or any other parish...in this county:

... I have this day received a certificate under the hands and seal of Daniel Fleming and Robert Philipson ... bearing the date of ... July last past signifying that Reynold Holme ... his wife [and others] fines not having been paid and the offenders now inhabiting the County of Lancaster ... Therefore by ... the before mentioned Act ... collect... the forfeit or fines aforesaid imposed on oath ... by distress of ... goods and chattels... when you have levied the same deliver the same to me for that I may deliver the sums... to the convicting Justice and the same may be distributed according to the Act.

A very large meeting on 15th September 1678 resulted in summary conviction at Rydal on 16th September 1678, upon the information of nine named informers *before us DF and CP*, and warrants for distress of goods. This is also in Besse.⁴⁷² The value of the distress levied against all attendees totalled £180.

A high level of activity is shown from 1680 to 1685. This reflects the intense anti-dissenting policy that prevailed in this period and, probably the fact that the Lord Chief Justice, George Jeffreys came onto the northern circuit in 1684.

WDRY Box 31/3 contains Latin form of records for conventicles in 1682 and 1683, records of committal to gaol for non-repair of the church in 1684 and a series of warrants. The tenacity of both Fleming and the Quakers is particularly demonstrated in this series. There are many sealed warrants in 1684, often containing the same names. Besse correspondingly records several of JP Edward

⁴⁷¹ The same issue arises in Cheshire as mentioned below.

⁴⁷² Besse [Sessions Trust 2000] 26-27.

Wilson's warrants in full and Fleming's warrants for distress totalling £56 6s 6d.⁴⁷³

The following also shows the use of the provision for cross-county proceedings in s.III Conventicles Act 1670:

29th October 1683. Certificate of Roger Kirby and Fleming against Jacob Holme at Lancaster for a conventicle on 14th October 1683 at Edward Satterthwaite's house. Fined and removed out of Lancashire and *is now an inhabitant of Westmoreland* and ordering the monies to be obtained.⁴⁷⁴

Correspondence between the magistrates of neighbouring counties also provides an insight into local problems that occurred when one of the few roads became impassable. On 23rd June 1684, Roger and William Kirby, Lancashire magistrates wrote to Fleming:

We have herewith sent 3 certificates against Conventicles ...out of county ... could not [send] their certificates sooner, yet hope the road being made up... then three months after the offences will be looked up...Within the statute to warrant the levying of the penalties after the three months expires.

Conventicles in Cheshire

At the General Sessions in Chester 19th November 1661, a Quaker, *Robert Taylor, yeoman of Clutterwick* was imprisoned by warrant⁴⁷⁵ signed by Humphrey Milton, attested by Leycester, Richard Grosvenor and Thomas Mainwaring, JPs, addressed to the constables of Clatterwick.

January 1662, twenty-nine indicted at Chester quarter sessions for being at an unlawful assembly.

⁴⁷³ Besse (Sessions Trust 2000) 29-34.

⁴⁷⁴ WDRY 35/5(Cumbria Archive, Kendal).

⁴⁷⁵ The full text is in the Appendix.

Some of the Cheshire records convey a more diffident tone about proceeding against Quakers than that of the prosecutors further north. There was great concern over one individual, Richard Smith, who acted in flagrant disregard of the Act by holding conventicles every week in the middle of Chester. Fleming, who contended with the equally persistent Holmes, did not seek specific advice and routinely applied the conventicles law to him but does not seem to have been interested in imprisoning him.

Robert Morrey, Maior. ... 8th August 1670.

To ... William Williams, esq., the Recorder of the Cittie of Chester. ⁴⁷⁶

...The Quakers notwithstanding the many conviccions some of them are under upon the late Act against conventicles, doo routine their meetings to our every Sabbath day ... And are soo farr from Suffering that they ... being not att all dishearted fore ought that we can perceive by our proceedings against them upon that Act, wherefore wee this the last Sabbath gave one...The Act against Quakers And remitted them also to the prison for their Meeting upon that day, saving only ...Richard Smith (the Ring Leader of that sect) to whom wee tendered the oath of allegiance, who refusing the form... therefore committed him to prison... And then wee proceded upon through the last Act, ...but all in vain...

Wee had it then in our thoughts to have tendered them the oath and upon refusal to take the oath to have committed them to prison but wee ... of that intention till wee have first acquainted you be ...wherefore wee earnestly desire you by the most your ... herein,

Reply 10th August 1670.

The obstinacy of the Quakers at Chester may justifie you're proceedings against them: ... it is a very difficult thing to suppress their meetings and they are generally poore and therefore hard to punish them by fine upon the late Act against Conventicles...I think it is your first Cause if any distress may be found to proceed upon this last Act. There can be no more expected from a Magistrate but to put the law in execution according to the direction

⁴⁷⁶ ZM/L/3/467and 468 (Chester Archive).

of it. If this law can be found defective they who have the legislative power will probably att there meeting ... supply it. In the meane time I think it best proceeding upon this Act of Parliament against conventicles being the last law made of their punishment. I know if the constables be industrious to distress and dispose of the distress itt will detur the Quakers more than imprisonment.

I desire you ...will accept my sincere sympathy ...

Williams.

By way of comparison, Besse's account is:⁴⁷⁷

Several inhabitants... suffered for their religious meetings, distress of goods to the value of £86 17s. Richard Smith of Chester had his goods seized several times, for meetings at his house to a value far exceeding the fines imposed which were usually £20 for each meeting. Likewise Edward Morgan and others...suffered greatly by the Conventicles Act upon the information of soldiers and base persons encouraged by the Mayor and Alderman Poole, who, when informed of a Meeting, ordered his clerk to proceed to the utmost extent of the law, bidding the officers take enough who accordingly made distress to 5 or 6 times the value of the fines.

This also shows that the garrison soldiers of Chester Castle had latched on to the fact that they could benefit from informing on the events so close to them.

Another significant instance of differing accounts of the same incident is this. Besse records⁴⁷⁸:

On midsummer day this Year [1677] Sir Peter Leycester, JP, who also acted the Part of an Informer, came personally to a Meeting at the house of William Gandy, shut up the doors, and placed a Guard of soldiers at them, while he took a list of about 200 names and fined Margaret Fox and Thomas Docwra 20l. each, for the Preaching; he also ordered 20l. to be levied on several of the Assembly for the House they met at, beside their own Fines, for

⁴⁷⁷ Besse (Sessions Trust 2008)105.

⁴⁷⁸Ibid 106.

which he issued Warrants of distress, threatening the Constables, that if they did not execute them to the utmost, he would bind them to their good behaviour, charging them to sell a cow for 5s. and to take enough for themselves. Those Officers, thus animated, took away for that one Meeting, Goods and Cattle to the Value of about 20l. from John Hathurst, Hugh Crosby, Richard Parr, Eleazar Taylor, John Eaton jun. and Peter Pickering.

Leycester's ⁴⁷⁹record contains a memorandum in Latin with 200 names listed according to parishes and their occupations, including conventiclers from Lancashire which are listed separately. He issued the following warrant, 24th June 1677:

... to constables of Over Whitby ... and especially to the Constables of Middlewich ... strictly to charge and command you and every one of you that you forthwith repayre to me at the house of William Gandy of Frandley to suppress, take and informe against all such persons as shall there be found... at an unlawful Conventicle now assembled together ...and bring with you what persons you can, charging them in his Majestie's Name to goe along with you for the suppression of the Conventicle immediately without delay and such persons as shall refuse to come along with you so charged by you that you certify their names unto me in writing...fail not at your perils. Those of Lancashire were certified to me by Henry Booth, JP of Lancs...that he might issue out his warrants accordingly.

Leycester listed the monies received from the constables: 5s from each of them, save for those (mainly single women) who lacked sufficient means. He recorded that Thomas Vernon, constable of Allostock, swore to the fact that he had enquired but could find no goods to distrain upon for the specified fine. Leycester noted that by 3rd August 1677 *in all £31 5s payd besides appeales.*

Leycester pursued the local attendees for the fines that were levied on Fox and Docwra under section III of the Conventicles Act 1670. Several people were fined

⁴⁷⁹ *Record for the Conviction of the Quakers taken in a Conventicle at Frandley* (DLT/B11 Chester archive).

£3 each *in part* for Margaret Fox's fine. Gandy and Peter Pickering were each fined £9 *in part* of her fine for hosting the meeting. John Williamson was fined £2 for part of Docwra's fine. *In Toto £ 84 -10-0.*

Some Quakers appealed, on 14th July 1677, against the fines that had been imposed upon them for Margaret Fox, part of the fine of Thomas Docwra and part of the fine for the house. *These Appeales were adjudged voyd at the Quarter Sessions at Knutsford October 2 1677.* This must have been because they did not enter into recognisance as required by section VI.

Leycester's record reveals the following matters that are not apparent from Besse.

- i. This event was evidently not a standard local meeting for worship but a jamboree, with 'key speakers,' that had attracted around two hundred people.
- ii. Warrants had to be made to constables in each of those parishes where the offenders lived, showing that Quakers had travelled to the Frandley meeting from a number of different parishes.
- iii. Leycester issued certificates for recovery of fines across the neighbouring county of Lancashire under section III of the Conventicles Act. Besse's Lancashire record for the same date records distress levied on some people but he does not marry the two instances. This conveys the wrong impression of widespread but separate proceedings for distress as though Quakers were being unsystematically hounded.
- iv. The highest fines were against the householder, William Gandy, and the speakers, who were the leading Quakers Margaret Fox and Thomas Docwra.⁴⁸⁰

It is apparent from the above that the volume of proceedings was enormous and that, during the currency of the respective acts against conventicles, the

⁴⁸⁰ It is curious that the leaders of this event did not pay fines themselves or that those who were held liable in their default did not ask them to.

proceedings became part of magistrates' routine business, albeit with singular issues that arose because of the nature of Quaker meetings.

Given the scale of Quaker intransigence, practical issues inevitably arose concerning the application of the law. The next section examines the legal problems from the perspectives of both judges and Quakers.

3. Legal Issues that arose from the Legislation to Suppress Meetings

Introduction

A number of common themes that concerned both law enforcers and subjects of the law emerge from examining and cross-referencing national and local sources. The national sources include:

- Quakers' Formal Instructions to Counsel⁴⁸¹ to advise on the scope and interpretation of the 1670 Act.⁴⁸²
- Sir Thomas Sclater's Law Notes bearing the title 'Doubts in the Act for Conventicles and Rules for Justices ...'⁴⁸³
- Legal commentary and judicial interpretation with particular reference to JPs, by Sir Edmund Saunders, Kt. late Lord Chief Justice of England.⁴⁸⁴

Local sources comprise Besse's accounts, assize depositions and the Mayor of Chester's papers.

The themes are discussed below.

Breaking Doors

Whilst they knew that they were breaking the law by meeting, Quakers were shocked to find that doors of their homes could be broken. Not only were they

⁴⁸¹ The Book of Cases, Volume 1 YM/MfS/BOC/1 (Quaker Archive).

⁴⁸² This record of the advice is undated and, in theory, could relate to either of the two Conventicles Acts. However, since the Book of Cases was established after a decision of the Yearly Meeting in 1676 when Quakers decided centrally to record sufferings and to obtain legal advice, it is more likely that this concerned the 1670 Conventicles Act.

⁴⁸³ MS Rawl D 1136 (Bodleian Library). Thomas Sclater's Notes were addressed to Cambridge JPs but were pertinent nationally. 'Doubts' references queries concerning the applicable law.

⁴⁸⁴ Edmund Saunders, *Upon the Statute Of 22 Car II. Cap. I. Entitled An Act to Prevent and Suppress Seditious Conventicles* (London 1685). (Middle Temple Library, Tract L553). This was designed to provide Middlesex JPs with his observations *in sundry points upon this Statute*.

perturbed at this violation of their understanding of English law, but magistrates were also concerned about how to interpret the respective sections XIII of the 1664 Act, and section VIII of the 1670 Act in conjunction with the provision for levying distress for fines.⁴⁸⁵

Entries in Besse indicate that the issue was connected to seizing goods as opposed to forcing entry to meetings which is what the legislation, and a reinforcing 1682 order to JPs authorised:⁴⁸⁶

it is further ordered by this Court that in case any of the Officers above mentioned meet with any resistance, by the shutting up or barring up of any doors or gates of any House or place where unlawful Conventicles or meetings are held, they are required to break open such Doors or Gates to the intent that such unlawful Meeters... may be proceeded against according to Law...

The law was unclear and resulted in conflicting legal opinions. Sclater advised JPs that *Constables by warrant of distress may break open doors where the Kyng is a party and levying in may distrein for the poor and church informer.*⁴⁸⁷

Saunders said a warrant to levy penalties under the hand and seal of the convicting justice is, in its nature, an execution of the King and officers may break open doors to enter if not opened when asked. They must ask first but no answer could be deemed a denial. He acknowledged a legal objection to this, namely that the King has no interest in this until his third share was distributed, *But this is the King's law, Conviction by his Officers, and the distress is an execution for him.*⁴⁸⁸

Quakers sought legal advice from Thomas Corbett:

⁴⁸⁵ The full provisions are set out in the preceding chapter.

⁴⁸⁶ The New Orders of His Majesty's Justices of the Peace, for putting the Laws in Execution against all Seminaries, Conventicles and unlawful meetings_LL003/02 (Quaker Archive).

⁴⁸⁷ MS Rawl D 1136(n483).

⁴⁸⁸ Sir Edmund Saunders (n474) 145.

Q. Whether one or more JPs may grant a warrant to breake a persons dwelling house door locks to make distress after conviction upon this statute contrary to the tenour of all process and executions?

A. They cannot... although the third part of the penalty is given to the King because the king is not a party to the Record ... of the conviction but only the Informer...

I conceive clearly that a Constable cannot justify breaking open... the parties doors to levy penalties though no other distress can be found... and I... delivered two opinions in two cases within three months last past to that purpose. It was afterwards lately ruled in the like case accordingly by the King and his Counsell.

Q. Whether a constable or other officer by or without warrant could break open doors or locks within a dwelling house or without or climb through windows or shop windows or such like to levy the distress.

A. in law this is a breach of the house. A man's house is for him a castle of defence and so is every part or room therein.

Correspondence between the mayor and recorder of Chester⁴⁸⁹ shows the query being raised by local justices.⁴⁹⁰ It also indicates that Quakers tried to block entry for distraint.

...we have ...issued warrants for some Quakers for levying fines upon the offenders goods and chattels... notwithstanding ...the warrant doo keep their doors shut and bolted or locked so that the constables cannot have admission into their houses ...And some of them do convey their goods forth of their houses into places ... to flout the exercise of the warrant, And there being no [provision] in that Act that doth directly authorise the Constables to break open the outer door or any yet of the house upon these warrants as wee ...are doubtful whether they may legally attempt it... we being most unwilling either to countenance or connive at these meeting , and also to do anything that might bee repugnant to the law, ...

William Williams, the Recorder replied from Gray's Inn.

⁴⁸⁹ The full citation is contained in the Appendix.

⁴⁹⁰ ZM/L/3/407 (Chester Archive).

I consulted ...of able Counsell Upon your doubts upon the late Act against conventicles and am confirmed in what I writ in my last letter: If the constable gett into the house of persons convicted and fined upon this Act ... I think notwithstanding their peaceable entry they must not break open the inner rooms to distrayn.

Not liking the advice he received, the mayor persisted:

... All our proceedings against them will bee ineffective and they, when they understand that defect in the law, will be more imboldened ...if this Act ...do not virtually give power to break open doors upon warrants of distress... Wee desire you to consult the Lord Keeper, or whom else you think fit upon that part of the Act, and be pleased to impart their opinion therein to us. We likewise pray your solution to this question, ... Our desire, not to do anything inadvisable but ... your direction first in all ambiguous cases, and yet to have the law duly executed upon obstinate offenders...

The author of the tract *Tam Quam*⁴⁹¹ argues that execution of warrants and breaking doors on Lords Day *commonly done by Justices* is contrary to an Act of the Sabbath. Quakers often met to worship on Sundays, and JPs were required under the Conventicles Acts to disperse such meetings as came to their knowledge.

The above advices notwithstanding, breaking doors was common. The following paraphrases Besse's records on this subject, in Cheshire:

- 1675. William Hall of Congleton, fined £20 for a meeting at his house, had his dwelling house broke open, and 2 cartloads of goods worth £40 taken away.
- 1682. The house of James Clayton was beset in the night by constables who broke open his doors and took away most of his goods amounting to but £3.

⁴⁹¹ Anon, *TAM QUAM: OR AN ATTAINT Brought in the Supream Court of the King of Kings; upon the Statutes Exod 20 7 16 and Levit 1 12* (LONDON 1683) (Dr Williams Library, Tracts 1641-1700). This tract is discussed in further detail in Chapters Five and Six.

- Lestwich, Oldfield. JP 'discovered more Zeal than Knowledge in the Law' when coming too late to disperse a Meeting. Just before it concluded, he ordered William Becket 'a rude Informer', to break the door of the Meeting House in pieces and some time after came with constables and took away all the seats with the door and window shutters and never returned them.
- 1684. Thomas Pott of Wilmslow fined £20 for a meeting at his house, very poor. Officers broke open his doors and rifled his house, took £3 0s 6d goods. He and his family had to lodge with neighbours.
- John Helsby. Warrant issued because no distress for fine. Constable broke open his door and thrust him into a nasty place of confinement in the courthouse. But after some time turned him out again, bidding him be ready next morning to go to Chester Gaol; but reflecting afterward on the Illegality of what he had done, he proceeded no further.

The Scope of JPs' and Constables' Statutory Duty under the 1664 and 1670

Conventicles Acts

In relation to the liability of a constable neglecting to levy penalties according to a JPs warrant, the Quakers' Counsel's interpretation⁴⁹² was that neglect of duty, and the consequent fine, only applied to a constables' failure to inform a JP and endeavour the conviction of parties attending meetings.

Sclater⁴⁹³ advised justices to give rules for constables going to dissolve a conventicle. He records queries over *whether a Justice bee bound to goe himself to dissolve a conventicle or whether he may send someone by warrant, and whether he be bound to go outside his division.*

Many warrants contained variants of the exhortation to constables *fail not at your peril.*

⁴⁹² Certain Queries upon the late Act of Parliament against Conventicles to be resolved by Counsel, Book of Cases YM/MfS/BOC1 (Quaker Archive).

⁴⁹³ MS Rawl (n483) 148.

Leycester had strong views about constables which he conveyed to the grand jury at Middlewich on April 24, 1677.

Our Lawes are very good but they are ill executed – witness the multitude of vagrants and seditious conventicles amongst us which walk safely and undisturbed: Indeed the Generality of our Constables are very negligent of their duty herein ...

But for the better encouragement of Constables ...in their duties, whosoever shall bringe any vagrant ... and for every Conventicle discovered by him. He shall have a third part of the forfeitures... and if faile shall forfeit £5 for every failure to make known conventicle.⁴⁹⁴

The Definition of a Conventicle

Quakers asserted that their meetings did not fall within the statutory definition.⁴⁹⁵ This position was supported by other dissenters, such as Nicholas Lockyer,⁴⁹⁶ and several lawyers. Quakers obtained their own legal advice, from different barristers.

Quakers asked:

Q. If a company be met together and there is no preaching or teaching ... of Religion whether that can be counted a Conventicle within the said Act?

A. I conceive clearly that such a meeting is not a Conventicle within the said act without some ... of Religion and in other manner than according to the Liturgie and practice of the Church of England for that...none can say or swear that there was any colour or pretences of religion and the intent of the Act is to restrain only such ...as is not so according.

This was moot. In practice, many juries found, or were directed to find, against this interpretation.

Sclater ⁴⁹⁷ said:

If no Liturgy be said, question if itt bee a conventicle. He advised Justices going to view a Conventicle to take note of a preacher and housekeeper and

⁴⁹⁴ EM Halcrow (Ed.) *Charges to the Grand Jury at Quarter Sessions 1660-1677* by Sir Peter Leicester (Chetham Society 3rd series v) 1953.

⁴⁹⁵ As discussed in Chapter Three, Section 2.

⁴⁹⁶ An ejected minister who became a prominent dissenter.

⁴⁹⁷ MS Rawl (n483) 17.

know what number there were in the family. Also, to note if the Conventiclers have any bibles and know upon what colour or pretence they meet.

If a Conventicle may nott be adjudged to be soe before though the preacher bee not come in? Recorder Pepys adjudged one at Cottenhow May 70.

Further queries indicate Quakers wondered about avoiding the Act:

If the preacher preach out of a house window and there be both 4 persons besides those of the families within doors and hundreds without it bee a Conventicles within the meaning of 22 Car 2 because it is said in a house field or place? And a question of two houses adjoining and a small partition and in both houses past the number of four ... besides families. Was this contrary to 22 Car c. 2 where it saies House not Houses?

Saunders' observations⁴⁹⁸ echo Bridgeman's direction to the jury that was cited in Section 2 of Chapter Three.

For the chief end and design of the Statute was to prevent Sedition and Insurrections... this Law is made to suppress Conventicles, where ... Sedition and Insurrections were contrived. Now if they should not be convicted, though there was no actual exercise of religion, then their Plotting Sedition, and contriving Insurrections being the greater Evil, should escape Correction, whilst the pretended exercise of religion being the lesser Evil ...nor could be the intent of the Statute;

Conventicle of 5 or more not of same household: Now here we have a complete definition of a Conventicle within this Act...

...by the Act of Uniformity of 13 and 14 Car.2 cap 4. ...Preaching in a Conventicles, where the Common Prayers appointed to be read for the time of the day are not first solemnly read, is an Exercise of religion in other

⁴⁹⁸ The full text is in the Appendix.

manner than according to the Liturgy and Practice of the Church of England.

The following two sources highlight the difficulty over whether witnesses could swear to the fact of the practice of religion in a Quaker meeting.

Assize Record, 31st July 1664. ⁴⁹⁹

This gives the gist of the referral to assize and illustrates the difficulty over proof of whether the assembly was contrary to the liturgy of the Church of England. It contains the sworn information of Anthony Hunter and Thomas Fisher which reads:

That being this day at Sunderland⁵⁰⁰ ...about 12 of the Clock there found assembled... in the house of... William Allcock about forty men and woomen of those called Quakers...of ...worship they cannot say they heard any... but being asked what they did there gave no reply...

The examinations consist of brief statements from four named Quakers. They admit to being together but deny the purpose of the meeting. William Wilson acknowledges there were sufficient witnesses to prove his presence but denies knowledge of the Act. Richard Wilson denies being in breach of the Act and questions *whether it is now in force or not*. Adam Moore said:

if there be such a law as not to meet together about five in number (that he cannot own) he must suffer by it, denyeth as aforesaid.

They say that they prefer God's laws to man's. There is reference to a fine of £5. John Borranskaile refused to pay the fine.⁵⁰¹

⁴⁹⁹ The National Archive ASSI/45/7/1/29.

⁵⁰⁰ This Sunderland is in Cumberland, 5 miles North East of Cockermouth.

⁵⁰¹ It is not known whether they had access to a lawyer before their examinations were recorded. This predated the more co-ordinated response of Quakers as Charles II's reign established itself but it indicates that they had a general understanding of the legal issues likely to concern them.

Counsellor at Law's Opinion⁵⁰²

This opinion considered *whether the defendants are within the statute* in circumstances where the JP had reservations about his informers' evidence:

I sent for the persons charged and ... they confess themselves... at a religious exercise but denie it to be in other manner than according to the liturgies and practice of the church of England, maintained it as the same God through the mediator of his spirit who admit persons of all ages... to our assemblies and practice... Whereupon I demanded of the Informers being upon their Oaths whether they could safely swear ... in a pretended religious exercise ... in other manner than according to the liturgies and practice of the Church of England and cautioned them they must necessarily know what the liturgie is, what the Church of England is and what its practice is ...The Informers were able to give no other answer than this, that in as much as the meeting was not in a church or public place of worship ... this they took to be a conventicle within the meaning of the Act...

Seeing the Act give me three months to deliberate on this matter I dismissed both parties... suggesting how they might be interrogated in that regard, and that they would be at risk if they sought to swear to something that they did not know.

The opinion conforms to the (then) approach to statutory interpretation, referring to the *tytle* and recital as guides to the intention of the Act. It goes further than pure legal opinion in referring to scriptural authorities (not canon law). It cautions against proceedings, excessive zeal and jeopardising a reputation for justice and integrity and warns of the risk of an appeal:

I have given you ... of what you demanded not only in my particular calling relating to the law but also my general calling as a Christian ... but I also know it upon Appeal at the Sessions in a neighbouring county. The Appellants have been discharged upon some of the reasons ... judgement of 100l may stick to your thoughts ...

⁵⁰² This tract was widely disseminated. It may have been a dissenting lawyer's 'spoof.' Daniel Fleming kept a copy (WDry, Cumbria Archive, Kendal). A copy held in the Henry E Huntington Library, California (ref 12868) annotated by Lord Bridgewater, refers to *fools* and *knaves* which chimes with a reference to Quakers as fools and knaves in the Calendar of State Papers.

Witnesses' Oaths

Q. Whether a JP can force by summons or otherwise any person to swear against another to prove the breach of the law.⁵⁰³

A. The Act giving the JP power to convict the party by proof of witnesses doth thereby impliedly and incidentally give him power to summon witnesses to that end and if they appeared and obstinately refused in his presence to depose their knowledge or doe not appear upon summons it is a contempt and no more.

Q. Whether a Justice can tender an Oath to one to answer such questions as shall be demanded of him.

A. JP may tender an Oath to one to answer such things as he shall demand of him in order to the granting of the peace or good behaviour but not in this case as the proper oath being the evidence that you shall give.

Sclater advised:

- i. that JPs ensure examinations of witnesses or informers were upon oath, put in writing and their hand subscribed to it.
- ii. Proof by confession. This must be Judicial before the Justice himself at the time of the Conviction, not at another time before another person; *for such Confession, though sworn before the Justices by sufficient witnesses, is only an Evidence, or Circumstances of the Fact, but not a ground to convict the Offender ipso facto as confession before the Justice is.*
- iii. Confessions should not be on oath.⁵⁰⁴

Saunders's advice evinces his concern to protect JPs from appeals.

- i. *If convicted as an Offender when absent, from which no Appeal is given by this Act... it may be the conviction is utterly void and the Offender may maintain an action of Trespass against the Officer that levies the penalty ...Therefore, if the Offender is present when Convicted, it will be the safest way to mention it in the Record. It is*

⁵⁰³ *The Book of Cases*, Volume 1, 1661-1695, (YM/Mf S/BOC/1 Quaker Archive).

⁵⁰⁴ *Rules for Justices going to view a conventicle*, no. 4 (MS Rawl (n483) 148).

essential to record under hand and seal of Justice. Often only a Seal is required this but this Act specifies both.

- ii. Now what if the chief Magistrate, and one or more JPs of the place should jointly convict ... where the Act saith, That one or more JPs or Chief Magistrate, is such conviction good? I think it maybe good enough, however, I would not advise it as safe, because it seems prejudicial to the Appeals given by this Act, for it may fall out that all the justices and chief Magistrate might record the 1st conviction, and the Party grieved would have no appeal but only to the same persons who convicted him, which would be inconvenient.*
- iii. The imposition of the fine must be in the same record as the conviction. It is not safe or justifiable to make a warrant to levy any fine but that which is contained in the conviction.*
- iv. An Infamous person convicted (but not just indicted) of Perjury, Forgery, and Felony is disabled to give testimony in any case whatsoever. In practice, a JP might not know of the particular witnesses' disability. If so, a Record of Conviction on that testimony is a good record, unless avoided by an Appeal under the Act. An attender at the Conventicle is a good witness even if he is an offender. The oath and the evidence under oath should be in Writing so that the Justice can certify to the Sessions the evidence upon which the Conviction pass for use in any Appeal.*

Fines

Q. If a man be once convicted for suffering a meeting at his house and the twenty pounds penalty either levied or paid for the same, doth he incur the like penalty of £20 for every meeting afterwards by him suffered at the same house?

A. the words of the Act...shall forfeit £20 without saying for every such offence, I conceive it doubtfull whether the same person doth incur the like penalty for suffering any such meeting afterwards...The...words for every such offence are ...omitted in the said Act and ...are not wanting in other parts of the same Act... and are usually inserted in other penal Acts of Parliament ... whereby forfeitures of money are imposed for severall other offences.

This was a vital question, given the Quakers' determination to continue holding meetings. The Act makes specific provision for second and third offences for being present at an assembly and for preaching more than once, but is indeed silent as to this particular repeated offence.

Besse reports two appeals against fines:

- i) In 1675 a number appealed their conviction for attending a meeting. The ground seems to be that £100 was levied against 'sundry' persons not all of whom were present. The jury acquitted the appellants. However, the justices overruled them and treble costs were awarded against the appellants.
- ii) On 31st March 1678 John Harrison of Bolton was convicted of preaching at a meeting in Macclesfield. The Mayor of Chester and two justices fined Harrison £20 for preaching but, when the meeting continued, they returned and fined him again. Harrison successfully appealed on the basis that he had been wrongly fined £40 *for that they had made two offences of one preaching.*⁵⁰⁵

Justices also sought advice about second meetings:

... if the Quakers ... apprehended shall immediately after their first ... meet together again in the same place whether that later meeting may be adjudged a second offence, these things being a little dubious unto us wee humbly desire you will please peruse the Act and give your advice upon these poynts ... for our more regular and justifiable proceedings...

Saunders said that 10s could only be imposed after conviction of the 1st offence. *The Justice may nott... fine ... according to the numbers he judged them to bee.*⁵⁰⁶

Beneficiaries of Rewards and Fines

Q.⁵⁰⁷ Whether the Informer who swears for his own profit to have his reward or moneys for prosecution can be legal evidence?

⁵⁰⁵ Besse (Sessions Trust 2000) 323-324.

⁵⁰⁶ Saunders (n 484).

⁵⁰⁷ Book of Cases (n 481).

A. The informer cannot be a legal witness being to gayn by conviction for the Law to prevent perjury admits not any interested witness.

Q. Whether such who pay to the poore and almes of the parrish can be evidence when as the moneys raised by such convictions excuse their charge in maintaining the poore.

A. Such as pay to the poor of the parish where the offence is committed are in equal condition with such who will swear to enlarge their own parrish bounds who never have been allowed as good witnesses in that case.

Counsel also advised that the poor of the parish:

who are to have a third part of the forfeiture are ...excluded from being witness for they will swear for own their immediate advantage.

Sclater refers to doubts over whether a justice must take his man to be an informer if he cannot *goe alone, and if there are doubts about the informers*. He advised examination of informers *in an open place, the door open and... persons accused ...to be present and to offer what evidence they cann before the Record or Conviction...*⁵⁰⁸

Besse highlights the recurrent issue of dishonest, debt ridden and incentivised informers throughout his records. For example:

1666. Nine Quakers were committed to Chester gaol for meeting at Jannery's house. Information of John Burgess and Thomas Hease, bad characters. Hease fled for debt, turned out of his own house by the sheriff, some of his children sent to the parish for maintenance. Burgess imprisoned for debt where he died.

1671. John Daniel, JP, was so earnest in prosecuting men for their religious meetings he made his own servants informers, and took the goods himself on his own warrants to value of £85 8s 2d in 1670/71.

1674/5. Informers John and Richard Johnson, John Frodsham *made much spoil*. Ten or twelve widows were bereft of their goods *till they had not a skillet to boil their children's food in*.

⁵⁰⁸ MS Rawl (n483) 148.

The wicked informers and Constable Birch pulled several out of a meeting by their hair swearing they would cut off their arms if they would not come out and abusing them very inhumanely.

1678. Grievous was the spoil made by Informers who took away goods without producing their warrant and frequently sold cattle for less than their value, encouraged by Justice Egerton.

Quakers petitioned JPs at a public session in Kendal regarding false information given by Henry Kirby:

We told you at the former Sessions when we appeared you required us either to submit ... to an Indictment or contend ...the Indictment was false and did believe the Clarke had grounded it falsely but if you would but have Henry Kirby to have been called or examined in our presence we know he would not have testified any further against us... as we are sent hither on a mittimus for refusing to submit to an Indictment ... the law is not to require any man to bear testimony against himself, yet notwithstanding we are far from ashamed of any assembly or meeting that we had had upon religious account for the worship of God, it upon that account that we meet, we must either deny the same? Or suffer the penalty of the law.⁵⁰⁹

Summary Convictions

Q.⁵¹⁰ whether a JP could legally convict a person for being present at a religious assembly... without the person being present or summonsed to appear before such Justice to Answer for themselves as in all other Tryalls or convictions is provided.

This may refer to the next stage of an indictment when a defendant would have to be summonsed.

A. A JP cannot legally convict without such summons because old common law, the civil law and the law of nature requires it ... Besides the Act further doth imply it points the conviction or proof which is also not to be till after the matter of fact is denied.

⁵⁰⁹ Besse (Sessions Trust 2000).

⁵¹⁰ Book of Cases(n481)

In many summary convictions, the JP attended the meeting and convicted Quakers there and then. The Conventicles Act provided that a JP could convict on the sworn evidence of witnesses and “notorious evidence”. This raised an ambiguity. Sclater recorded doubts regarding the meaning of “notorious evidence” and “circumstances of the fact.” Saunders said it was difficult to lay down the exact bounds.

Violent JPs

Besse cites a Preston JP, Edward Rigby, who said that he would *move for a Law to have them tied to and dragged at either Horse’s or Cart’s Tail*. Other JPs expressed similar sentiments. There was actual physical violence reported by Besse, as summarised below:

1662, in Cumberland, Sir George Fletcher, stormed a meeting at Howhill with an armed retinue. He struck a person who was praying and ordered him to be pulled backwards... others at the meeting were dragged down the hill and sent to Carlisle gaol.

On 31st January 1683, in Cheshire, Thomas Needham and other justices came to a meeting in Newton... finding a person at prayer, Needham beat him on the head, punched him on the breast with his cane, pulled his neck cloth in pieces, threw him down and kicked him. He ... struck several others so that their heads swelled. The other justices desired him to forbear saying *Let us prosecute the Law upon them, but not abuse them*. Thus checked, he forbore striking but continued railing telling them *they were dogs and no men, no more Christian than their horses ...*

On 3rd June 1683 there was another instance of cruelty at Needham’s hands, when he and JP Egerton demanded of those who were met whether they would enter into recognisance to appear at the next quarter sessions. Besse records that, upon general refusal, they made a mittimus and sent for two constables to conduct about 80 of them to Chester Castle where there were not enough rooms. For two nights they had to walk about or lie on tables, benches or flags. About 30

were put into a stinking dungeon...Five weeks later, 75 of them were carried to the sessions fourteen miles away...most were fined with an order to commit to prison for non-payment. Many were committed, *among them was Alice Hignell, a very aged woman being exceedingly weak they carried her to Prison in a Cart.* ⁵¹¹

This was, by no means, a localised issue. Quakers sought legal advice: ⁵¹²

Q. Whether a JP can draw his knife upon people being religiously assembled to beat them himself or ...command others to beat them?

A. The very name of the office of JP being custo pacis rendomus ... and if he has been guilty thereof Quis custodial ipsum custodom pacis. Besides his office is judicial not ministerial and therefore warrants not such accons. ⁵¹³

A real difficulty was the lack of sanction or individual redress against JPs, as discussed in Chapter Three. There does not appear to have been a clear form of redress against unlawful activity in office. The King's 17th January 1661 Proclamation was confined to insisting upon the existing standard procedure requiring warrants, not the stretched abuse of such warrants. It also tends to point to the lack of a designated appeal procedure within the King's courts at this time. This is unlike the ecclesiastical court appeal system described in Chapter Two. The establishment of an appeals system was one of the demands of advocates of law reform. Appeals were generally confined to writs of error or petitions which had the status of appeal directly to the King. These had a measure of success but depended upon the prevailing political climate – vacillation in royal policy as discussed in the previous chapter was thus highly relevant.

The Distrainment of Goods

This issue drew many questions from counsel which shows how widespread and serious were the problems that Quakers faced.

⁵¹¹ Besse (Sessions Trust 2008)109.

⁵¹² Book of Cases (n481).

⁵¹³ Ibid.

Q. Whether a warrant for distress not expressing when or for what offence the conviction was made or when the pretended offence was committed can be good in law to make distress?

A. .. the warrant is not good.

The wording of warrants differed across the region, depending upon the circumstances and who was drafting them. Fleming, in the main, was legalistic in his citations but this question having been raised generically, there must have been wide variations, and some sloppiness, across the country as a whole.

Q. Whether a distress cannot be taken in the night-time or before sunrise or after sun setting?

A distress for rent cannot be taken in the night but for damages... it may as also in this case being in the nature of an execution and all executions may be made by night as well as day.

Q. If a JP 's warrant for distress is not performed is he liable to the £100 forfeit for refusing to act further?

A. The Act does not oblige JPs to make a warrant for levying the penalty... When they have made a reward of conviction they are not bound to do more unless they are complained to and their assistance is further required.

Besse cites countless incidents of selling goods below market value. It is not clear, from most of his records, whether an attempt had first been made to sell at full value, as counsel's advice stipulated, although there are instances where the officer had attempted to realise full value and consulted the JP for authorisation before selling for less, in which case they were seeking to follow due process.

The Book of Cases contains: A Letter to a Friend in Cumberland concerning some Friends that have had their goods distrained upon the Statute upon Conventicles. This refers to section II of the 1670 Act whereby the fines had to be paid into the Exchequer and divided so that the poor received a share. Westmoreland Quakers followed this up in relation to their fines paid to Musgrove:

...search has been made in the Exchequer for the year 1676 and we understand ...and no moneys returned as received of Musgrave... there has also been search made for this year and none yet brought in Upon perusal of the Statute upon

which friends goods were distrained we find that the Justices are to pay in the monies levied for the King's part into the quarter sessions who deliver it to the Sheriff in order to return up for the King, so before any complaint can be made with the Clerk of the Peace for your County and if possible get a Certificate from him that no moneys have been paid in by Musgrave since the distress taken. In case nothing has been paid to the parish poore thereof it were convenient (for aggravation) to get certificates from the parish wardons thereof...

Sclater found a series of points on distress:⁵¹⁴

- *Of distraining Beds Hats Hoods (which was advised against).*
- *If a Conventicler skulk and goe from one Howse to another and if noe goods of his can bee found ...*
- *If a Conventicler having no goods may be imprisoned by a Justice*
- *What the Justice or Constables shall doe if the conventiclors goods be pawned, aliened by sale or taken in execution.*

Another 'doubt' that Sclater addresses concerned section XIII of the Conventicles Act 1670 – *A certificate sent by a Justice of one county to a Justice of another of a Conventicler to meet by him for an offence out of the County he lives in – is the latter Justice to returne the fine to the first?*

It is noteworthy that specific legal issues connected to the interpretation of the Conventicles Acts were common to both sides and of sufficient importance that advice was required, not only from legal counsel acting on behalf of Quakers but from senior judges providing guidance to magistrates in the exercise of their duties.

⁵¹⁴ MS Rawl (n483).

4. Conclusion

This chapter has focussed upon archival evidence relating to the problems that surrounded Quaker meetings in the context of the law that was explained in the previous chapter. The local magistrates' records of summary proceedings, which appear to have been scarcely consulted, show complaints of persecution in a different light.

Besse's purpose was not to analyse the law and he only occasionally records the exact law that was put into operation. He points out where the basis of proceedings was unknown and challenged for that reason. Besse's entries, whilst correct, fail to convey the context for particular action on certain, telling, occasions (such as Leicester's account of the conventicle in June 1677) particularly when compared with other contemporary records of the same incidents. However, focusing on the activities of individuals who may have detested Quakers and failing to identify the law skews the picture towards the impression that the legal basis for proceedings concerning meetings was generally arbitrary. Close study of contemporary material reveals that the reality was more nuanced.

The duty to suppress meetings lay, in the first instance, upon the local justices of the peace. Besse and the papers of those in authority rarely directly corroborate each other. The divergence in accounts shows the Quakers' focus upon instances of aggression, perceived breaches of the law, mistaken or false accusations and convictions, disproportionate fines and distress, whereas the magistrates' accounts represent relatively routine processes or particular instances that caused them difficulty in the administration of the law.

The specific provisions under the range of laws that were employed is underappreciated and Section 3 has shown that the legal powers to deploy the law were not necessarily clear either to Quakers or to magistrates. However, recidivists undermine the operation of the law and the authority of legal officials. Quakers' persistence, typified by Reynard Holme and Richard Smith, frustrated

local magistrates upon whom the government put the onus to 'deal with' Quakers.

The sources in this chapter substantiate the point that was argued in Chapter Three, namely that conduct of the minor judicial officials, who were responsible for the 'low law'⁵¹⁵ which ordinary people encountered, should be considered in the context that they were bound, by their oath⁵¹⁶ to perform the duty inherent in their respective positions. Many of them may have exceeded their remit. The extent to which some JPs authorised the levying of distress, for instance, appears to have been unlawful. The scale of this is difficult to judge and one can only see those instances as illustrative, especially as compared to the instances of JPs insisting on adherence to the law.

Besse conveys the Quakers' self-portrayal as innocent victims of a persecutory and religiously bigoted regime and of magistrates, as representatives of this regime, freely abusing their powers. Upon close analysis, when looked at as a whole, the combination of contemporary records in Section 3 show that Quakers were complaining about abuses of the law. Except for 1660 and 1661, when they were detained en masse following Monk and Venner's revolt and the enactment of the 1662 Quaker Act, Quakers knew they were disobeying the prohibition on meetings and that they would have to face the consequences. The abuses referred to above: disproportionate distraint of goods; cruelty; and excessive physical force by constables and JPs; were of sufficient concern nationally that it merited their obtaining formal legal advice. Stringent fines, imprisonment and potential transportation were prescribed by the legislation. JPs had considerable discretion as to how they proceeded. The law must be operated upon principles of fairness, and within boundaries and sources set out above show that there were those in authority who took the same view, namely that the law was being abused by some. So whilst Quakers were not averse, for example, to avoiding

⁵¹⁵ Douglas Hay, *Dread of the Crown Office: The English Magistrate and the King's Bench, 1740-1800* in Norma Landau, *Law, Crime and English Society, 1660-1830* (Cambridge University Press 2001) 45.

⁵¹⁶ The oath taken by JPs is in the Oaths chapter.

distrain by devious means, as the Mayor of Chester's correspondence reveals, they did not deserve all the treatment they received.

The combination of national and local sources further show that Quakers were not passive but their resistance to an abuse of the law was constrained by the available means of challenge. Formal legal advice was obtained for what appear to have been largely practical matters occasioned by the substantive law. Conceptual challenges to the law came in the tracts against conventicles and in the petitions, which were both generic and individual.

Section VI of the 1670 Act only provided for appeal on specific grounds, although the local sources do show a number of appeals with varying degrees of success. Impoverished victims could (presumably) not afford to mount a legal challenge because of the attendant penalties of an unsuccessful challenge and the requirement to enter into recognisance to continue an appeal. However, it is clear that individual Quakers, when able, were prepared to tackle decisions to indict them and the amount and basis for the fines imposed.

In considering the extent of prosecutions across the range of proceedings during the Restoration, Horle concludes that criminal prosecutions were sporadic and capricious.⁵¹⁷ With respect to prosecutions for conventicles, the local sources show prosecutors following the laws as enacted, and the directions to enforce or exercise leniency when issued, which goes some way to accounting for their sporadic nature. The attitudes of prosecutors within the region varied. A feature which Horle regards as one of the reasons for their 'capricious' nature is that there was no central prosecuting authority. However, the sources indicate that those responsible for local law enforcement responded to the breaches of the law against meetings having regard to local conditions. I consider that the tendering of oaths was more capricious. The next chapter explores their use.

⁵¹⁷ Craig Horle, *Quakers and The English Legal System 1660-1685* (University of Pennsylvania Press 1988) 269.

Chapter Five

OATHS

1. General Introduction

In this chapter, by exploring the nature and purpose of oaths that were required in the mid-seventeenth century secular and ecclesiastical jurisdictions, I will show the wider context of Besse's statement that Quakers' *Constant obedience to the precept of Christ swear not at all...rendered them obnoxious to the penalties of the law.*⁵¹⁸

Refusal of oaths was the common denominator of many of the causes of action that led to severe penalties against Quakers. Moreover, proceedings against them for such refusal were often conflated with other offences.⁵¹⁹ However, as will be seen, this was not simply because they refused to swear an oath of allegiance to the King. Oaths were fundamental to governance and integral to legal procedures and transactions. Quakers' challenge to oaths per se threatened these and social norms.

Some historians of the seventeenth century have presented oaths as an increasingly otiose device whose practical utility was diminishing in favour of a '...view of obligation based upon contract and interest.'⁵²⁰ Hill's 'the use of oaths was declining'⁵²¹ is another such view. Hobbes' statement, in *Leviathan*, that an oath added nothing to an obligation,⁵²² may have provided some foundation for

⁵¹⁸ Joseph Besse, *A Collection of the Sufferings of the People called Quakers*, (Facsimile of 1753 Edition, The Sessions Book Trust, 2000) v.

⁵¹⁹ Indeed, some of the legislation, such as the Quaker Act 1662 that is described in Chapter Three, prescribed this.

⁵²⁰ David Martin Jones, *Conscience and Allegiance in Seventeenth Century England, The Political Significance of Oaths and Engagements* (University of Rochester Press 1999) 4.

⁵²¹ Christopher Hill, *Society and Puritanism in Pre-Revolutionary England* (Pimlico 2003) 345.

⁵²² Thomas Hobbes, *Leviathan or the Matter, Forme and Power of a Commonwealth, Ecclesiastical and Civil*, (First published 1651, Blackwell's Political Texts, Oxford 1946) 100 cited by Keith

this long-term retrospective. However, such views are inconsistent with a strand of seventeenth century criticism of oaths that was predicated upon their proliferation and overuse.

I contend that, during the Restoration, it is clear that oaths were neither otiose nor on the wane. There is limited interest in the subject on the part of legal historians, but Shapiro, who has studied them, asserts that they were 'ubiquitous.'⁵²³ The examples given below demonstrate their vitality.

This chapter describes how secular and ecclesiastical oaths were based upon theoretical foundations, and the relationship between casuistry and conscience in the swearing of oaths. It also looks at criticism of oaths in the early modern period. It describes the evolution of oaths of allegiance, and the plethora of other oaths which were central to legal processes in terms of establishing the veracity of witness evidence, the bone fide of claims, and the upholding of a range of professions and offices, from petty officials to the monarch himself. The chapter finally looks at local proceedings concerning Quakers in connection with their refusal of oaths and some of the legal issues that this raised.

2. Theories of Oaths in the Early Modern Period

Canon Law Theory

By the time of the Reformation, canon law had constructed a theological theory of oath taking.⁵²⁴

Hebrews 6:16 stipulated that humans 'swear by him that is greater than themselves.'⁵²⁵ God was the only being who knew whether the swearer was telling the truth or not. God was a witness, not a party, to an oath. The witness

Thomas, Cases of Conscience in Seventeenth Century England in *Public Duty and Private Conscience in Seventeenth Century England, Essays Presented to GE Aylmer*, John Morrill, Paul Slack and Daniel Woolf (eds) (Clarendon Press Oxford 1993) 45.

⁵²³ Barbara J, Shapiro, 'Oaths, Credibility and the Legal Process in Early Modern England: Part One' [2012] 6/2 Law and Humanities 145-178.

⁵²⁴ Jonathan Grey, *Oaths and the English Reformation* (Cambridge University Press 2012) 18.

⁵²⁵ Hebrews 6:16 Coverdale Bible, cited in Grey, *ibid* 19.

had to possess greater power than the swearer and have the power to punish for a false statement, by means of a curse, or 'execration.'⁵²⁶ This reflected God's omnipotence.

Canon law theory also held that the calling upon God in an oath recognised his essence as truth. Thus, oaths were a 'form of worship of God.'⁵²⁷ It is important, in relation to understanding Quakers' position that, whilst they distinguished themselves in many respects from other Protestants, they continued to regard oaths as a devotional statement. This accords with Grey's argument⁵²⁸ against Thomas'⁵²⁹ premise that the Protestant emphasis upon individual conscience inevitably shifted the ultimate sanction for truthfulness from external fear of divine punishment to Godly man's internal sense of responsibility because, so far as oaths were concerned, the fear of divine punishment persisted.

Catholics and Protestants both agreed that a lawful oath bound the conscience of the swearer, but they diverged, to a degree, with regard to the physical manner of swearing. Most early modern oaths were sworn on the Gospels, which were seen to represent the word of God. Oaths could also be sworn on the Mass Book, and upon relics, but Protestants rejected relics as forms of mediation between individuals and God. Physical contact with the item upon which the oath was sworn was believed to give access to God's knowledge of truth and his ability to punish falsehood. It was also how the Devil took hold and was invoked in the event of perjury.⁵³⁰

Oaths appeared in various guises. There were two general categories:⁵³¹

- i. oaths of loyalty and allegiance, or promissory oaths, which were made directly to God. Selden said that perjury did not apply to promissory oaths: '*in a promissory oath the mind I am in is a good interpretation, but*

⁵²⁶ Richard Hooper, *Early Writings* 477, quoted by Grey (n524) 20.

⁵²⁷ Grey (n524) 19.

⁵²⁸ Grey (n524) 76-77.

⁵²⁹ Keith Thomas, *Religion and the Decline of Magic, Studies in popular Belief in Sixteenth and Seventeenth Century England* (Weidenfeld and Nicholson 1971).

⁵³⁰ Grey (n524) 26.

⁵³¹ John Selden, et al. *Table Talk of John Selden* (G Routledge 1900) 173.

*if there be enough happened to change my mind I do not know why I should not.*⁵³²

- ii. oaths as to proof and honesty, or assertory oaths, which were made to man before God. Penalties for perjury, or lying on oath, applied to assertory oaths, under the Perjury and Subordination of Perjury Act 1562.⁵³³ There was a legal (perhaps as well as a political) basis for this argument.

The tract *Tam Quam*,⁵³⁴ points to English law's distinction between forswearing and perjury. False swearing, which was the biblical term and formed the basis of the tract's author's argument that grand juries who falsely swore to a verdict under the Elizabethan and Jacobean statutes will be punished by God, was **not** treated as *...Perjury, punishable by the statute law unless it is malicious, and in a case between party and party*. Perjury constituted an abuse of an oath in that it confirmed a lie within an oath. Canon law deemed it a sin worse than physical murder because it murdered the soul.⁵³⁵

An oath had to be lawful in itself; in other words, it would be invalid if it were for an evil or unlawful act. Such oaths should not be fulfilled because that would constitute a further sin.

Casuistry and Conscience

There was a divergence of opinion over the extent to which conscience allowed personal dissent from the obligation of an oath. A purist position was that one should not intentionally deceive through the swearing of an oath. However, 'Jesuits developed a radical casuistry designed to frustrate a hostile secular power.'⁵³⁶ This permitted mental reservation and equivocation in relation to a state-imposed oath. Unsurprisingly, this alarmed the church and state authority

⁵³² Selden (n531) quoted in Jones (n 520) 163.

⁵³³ 5 Eliz I c.9 s.2

⁵³⁴ *TAM QUAM: OR AN ATTAINT Brought in the Supream Court of the King of Kings; upon the Statutes Exod 20 7 16 and Levit 19 12* (LONDON 1683) (Dr Williams Library, Tracts 1641-1700). This tract is also discussed in Chapter Six.

⁵³⁵ Grey (n524) 36.

⁵³⁶ Jones (n520) 88.

in England, under the Tudors and early Stuarts. Consequently, civil lawyers developed a 'theory of oaths' regarding allegiance to the sovereign and the state. A casuistry⁵³⁷ surrounding the philosophical and theological bases of oaths developed in the Stuart period. Casuistry, which remained a prevalent (although increasingly satirised) discipline of thought until the last decades of the seventeenth century, provided the context for crucial developments in political thought.⁵³⁸ It engaged the political philosopher, Hobbes, who wrote, in *Leviathan* 1:7:

*men, vehemently in love with their own opinions (though never so absurd) and obstinately bent to maintain them, gave those opinions that revered the name of conscience as if they would have made it seem unlawful to charge or speak against them.*⁵³⁹

Jones refers to a 'taxonomy of conscience', that could deviate from the straightforward good, rational or regenerate conscience to include guilty, erroneous, probable, doubtful tender and scrupulous consciences.⁵⁴⁰ De Krey discerns four types of conscience from the writings of Restoration dissenters.⁵⁴¹ Quakers regarded themselves as being of tender conscience, by which they meant that they relied upon and would not depart from scripture for their spiritual leadings. This meant, to Quakers and others following Calvinist doctrine, 'the seat of religious illumination,'⁵⁴² after St. German's metaphor:⁵⁴³

as a lyghte sette in a lantern that all that is in the house may be sene thereby: so almighty God hath sette consyence in the myndes of every soule as a light whereby he may discerne and know what he ought to do.

⁵³⁷ as defined by Thomas (n529) 41 to mean a 'science of applying general rules of conduct to particular cases especially where rules conflicted or application caused doubt or perplexity,' rather than in a pejorative sense.

⁵³⁸ Thomas (n529) 44.

⁵³⁹ Hobbes (n 522) quoted in David Saunders, *Anti-Lawyers, Religion and the Critics of Law and State* (Routledge 1997) 5.

⁵⁴⁰ Jones (n 520) 86.

⁵⁴¹ Gary S De Krey, 'Rethinking the Restoration: Dissenting Cases for Conscience, 1667-1672' [1995] 38/1 *The Historical Journal* 53-83, Cambridge University Press.

⁵⁴² Rosemary Moore, *The Light in their Consciences, The Early Quakers in Britain 1646-1666* (Penn State University Press 2000) 219.

⁵⁴³ Christopher St. German, *A Dialogue in Englysshe bytwyxt a Doctor of Dyvynyte and a Student of the Laws*, Ch.8, fo.xxix, cited by Jones (n 518) 78.

The term 'tender conscience' did, however, have pejorative connotations. Clarendon regarded tender conscience as 'the product of light and sick brains of phrenetick preachers.'⁵⁴⁴

In 1649, Hall wrote 'conscience bound obedience to just laws and authority, even if men's laws could not bind conscience itself.'⁵⁴⁵ As we saw in the introductory chapter, for Quakers, conscience required obedience to God, as opposed to facilitating their autonomy. In practice, however, the issue of individual conscience posed problems with which the law had to grapple. Hale, the Lord Chief Justice, determined that private conscience 'sets up in every particular subject a tribunal superior to the magistrate'⁵⁴⁶ which aptly summarises the nature of many of Quakers' confrontations. The local studies illustrate how this was an issue with which local judges and magistrates who wrestled with Quakers' self-justified defiance, had to engage.

Theory underpinned all aspects of the use of oaths. General awareness of such theory in this period is evident in the criticism and objections to oaths which are outlined in the next section.

3. Criticism of Oaths

There were theological, devotional and social objections to oaths which were aired in treatises and tracts.

- i. **Theological objections** depended upon scriptural interpretation. From their inception, Quakers objected to oaths, on, predominantly, theological grounds. They cited Jesus' command in the Sermon on the Mount in St. Matthew's Gospel 5:33-37 *...But I say unto you swear not at all...your communication shall be, ye, ye; nay, nay. For whatever is more than that, cometh of evil* and St. James' 5:12 *above all... swear not.* Anabaptists, and others also refused to take oaths, although their

⁵⁴⁴ Cited in Jones (n520) 92.

⁵⁴⁵ J Hall, *Resolutions and Decisions of Diverse Practical Cases of Conscience in continued use amongst Men* (London 1649) 278. Cited in Jones (n518) 86.

⁵⁴⁶ Cited in Saunders (n539).

Protestantism took a different form. The authorities distrusted all of them, but the primary reason for Protestant refusal of oaths was not an intention to undermine state security: it was based upon their reading of scripture and their understanding of the leading of conscience.

Leading Quakers, such as Gervase Benson,⁵⁴⁷ and William Penn⁵⁴⁸ forcefully advocated the Quakers' position. Penn's authoritative *Treatise on Oaths* contained:

*several weighty reasons why the people call'd Quakers refuse to swear: and those confirmed by numerous testimonies out of Gentiles, Jews, and Christians, both fathers, doctors and martyrs.*⁵⁴⁹

This provided numerous scriptural references as evidence and was submitted by way of Petition on the 25th of the 3rd Moneth, 1675, Penn recites, *being also inform'd that it is your Resolution, to employ this Session to the Redress of Publick Grievances ...*⁵⁵⁰

ii. **Conscientious and devotional objections** concerned thoughtless swearing and were founded upon reverence for the sanctity of the oath.

This strand of objection was common to Quakers, Anabaptists and sceptics, including prominent critics such as Hobbes and the lawyer John Seldon who objected to their overuse:

⁵⁴⁷ Gervase Benson, *A True Testimony Concerning Oaths and Swearing etc and the Command of Christ, Swear not at all, manifested to be an universal prohibition of all Oaths, and Swearing whatsoever, to his Disciples* (London 1669). There are many other printed testimonies against oaths which can be found in the Quaker Library.

⁵⁴⁸ William Penn, (1644-1718) the son of an Admiral, became a Quaker around 1667. He was a leading Quaker and powerful political figure, as well as the founder of Pennsylvania.

⁵⁴⁹ William Penn, *Treatise on Oaths containing several weighty reasons why the people call'd Quakers refuse to swear: and those confirmed by numerous testimonies out of Gentiles, Jews and Christians, both fathers, doctors and martyrs* (London 1675) Library of the Society of Friends SR 059.5).

⁵⁵⁰ Murphy describes this *Treatise* as an example of Penn's prowess as a political thinker, Andrew Murphy *Liberty Conscience and Toleration, The Political Thought of William Penn* (Oxford University Press 2016).

*Now...oaths are so frequent, they should be taken like pills, swallowed whole; if you chew them, you will find them bitter; if you think what you swear, 'twill hardly go down.*⁵⁵¹

- iii. Hill⁵⁵² describes rejection of oaths in the early modern period as a longstanding form of **social protest** that had been deployed by various groups since mediaeval times. Moore⁵⁵³ adds that 'oath-taking could be a form of social distinction in that this was rarely required of the gentry.' She echoes Hill⁵⁵⁴ that oaths were usually only required of poorer sections of society. Hill's passage may be apt in relation to the use, and the refusal, of the ex officio oath in which 'the lower orders safeguarded themselves against trickery and pressure,'⁵⁵⁵ and it is indisputably the case that there was a longstanding history of opposition to oaths amongst various organised social movements from the Lollards onwards.

However, although such refusal (like Quakers' refusal to remove their hats) was a conscious snub to hierarchical authority,⁵⁵⁶ and a mark of separatism, I question the social distinction point as a generalisation. As will be seen from the examples, oaths were required in a wide range of legal proceedings, in which the aristocracy, gentry and anyone else had to swear for their testimony to be admitted and in accordance with the various standards of proof. This is supported by the contemporary writer, Burn: ⁵⁵⁷

...especially in relation to an oath, which is so sacred a thing, and which generally concerneth all the nobility, gentry and commonality of the realm of both sexes.

⁵⁵¹ Selden (n531)173.

⁵⁵² Hill (n521)329.

⁵⁵³ Moore (n542) 118.

⁵⁵⁴ Christopher Hill, *Society and Puritanism* (Secker and Warburg 1964) 382-419 (cited in Moore (n 542) 270 fn19.

⁵⁵⁵ Ibid 330.

⁵⁵⁶ There are also instances of Quakers refusing to recognise the competence of the official to require an oath.

⁵⁵⁷ Richard Burn, *A System of Ecclesiastical Law* (4th edition, H Woodfall and W Strachan 1743) 7.

Further, oaths were traditionally required in order to hold office of any rank or status, not only the positions at the lower end of the professional and social strata, but also those in higher positions such as magistrates (who were themselves usually the gentry), military officers, and lawyers. Of course, the monarch himself also had to swear an oath at his coronation.

These objections were countered by Anglicans. The scriptural foundation of oaths was asserted at the beginning of legal sessions, which demonstrates their centrality to legal procedure. Thus, John Gauden, in *A Discourse Concerning Publick Oaths*, London, 1662, which was written in answer to the Quakers, declared that the consensus of Old and New Testaments favoured oaths, citing, inter alia, Deuteronomy 6:13 *Thou shalt fear the Lorde thy God, and him only shalt thou serve, and swear by his name*. A statement in Hebrews 16 that oaths represented the end of all strife became employed by the state in respect of oaths of loyalty and allegiance.

As with theological and political apologists for oaths, such as Gauden cited above, addressing judges at the start of the legal terms, at local level there was a similar counter – argument made to the grand jury. In his address to the grand jury at Northwich on 4th April 1676, Peter Leycester pronounced, regarding Penn's treatise:

The book is Jesuitically written, and subtilly, intermingling truthes with falsehoods, to the ensnaring of weaker Judgements wherein his maine reasons ground upon Property, and established by magna carta: which property of the subject is not taken away: and this he would confirm by the old rebellious maxim- Salus Populi Suprema Lex: insinuating thereby, that Lawe and Property may be defended by the People; and so would propose some law of expediency ... But he never comes to the Point: for it is granted on all hands that Property is and ought to be established by Law, while the People lie regularly in Obedience to the Lawe: but may not Property be forfeited by offenders against the Law? as in the case of High Treason etc and so must all Penalties be levyed for the breach of all Penall statutes otherwayes no Lawes would be obeyed. ...

Robbins ⁵⁵⁸ says that Quakers regarded themselves as rescued from fraud; oaths were unnecessary for honest men who would keep their engagements and bear honest testimony. Penn also posed Quakers as role models:

How is it possible for men to recover that ancient Confidence that good men reposed in one another, if some don't lead the way, and hold forth to the World a Principle and Conversation beyond the Necessity of such extraordinary Expedients?

Besse cites a number of instances of judges and bishops repeatedly urging the leading Quakers to take the expedient step of compliance by taking the oath, following which they would (respectively) release them from the particular charge or absolve their excommunication. The accounts of the trials of Fell and Fox,⁵⁵⁹ cite their steadfast refusal to swear despite such pressure to demonstrate their commitment to this testimony and to lead the way.

From the perspective of legal administration, the problem, of course, would be in dealing with the proportion of the population who did not have the same scruples, so far as truthful testimony in court proceedings and in the administration of official positions was concerned, without the compelling force of an oath. ⁵⁶⁰

4. Oaths of Loyalty, Allegiance, Non-Resistance and other forms of 'State Oaths'⁵⁶¹

The casuistical context to conscience and oaths is particularly apposite in that it influenced both the form of oaths of allegiance and the law relating to them.

⁵⁵⁸ Caroline Robbins, 'Selden's Pills: State Oaths in England, 1558-1714' [1972] 35/4 *Huntington Library Quarterly* (University of Pennsylvania Press) 315.

⁵⁵⁹ For example, Besse (n 518) *Lancashire* 312-14; Fox, Margaret Askew Fell, *The Examination and Tryall of Margaret Fell and George Fox*, Early English Books Online.

⁵⁶⁰ Ultimately, of course, an accommodation was reached in the form of the Act that allowed Quakers to affirm rather than swear an oath. Quakers would probably have seen this as backwards way round in that the law should first favour their position against oaths.

⁵⁶¹ Jones (n520). Chapters 1 and 2 describe the early political development of state oaths of allegiance.

These so-called 'state oaths' were introduced through legislation. Their purpose was to bind subjects to the person of the monarch as opposed to an abstract office.⁵⁶² They were introduced as oaths of supremacy and allegiance under Elizabethan and Jacobean legislation and were designed to force Catholics to swear loyalty to the English monarch rather than the Pope. A variant, in the Interregnum, was an engagement of allegiance to the Commonwealth. It was followed by the oath of abjuration.

Jones demonstrates the evolving political significance of oaths in the mid-seventeenth century 'as a mechanism ...to secure...a unified ...body politic.'⁵⁶³ This sets the scene for the way in which Quakers became entrapped by their conscientious refusal to swear any oath. In fact, Quakers were willing to, and did, explicitly declare loyalty to the King but they would not adapt themselves to the form and content of an oath. This appears to have been one of the reasons why they were the targets of the Quaker and Conventicles Acts that are described in Chapter Three.

The preamble to the Quaker Act 1662,⁵⁶⁴ demonstrates how the device of an oath was fundamental to the legal fabric, firstly, in relation to state security, secondly in relation to veracity of evidence and, thirdly, in the routine administration of the law:

Whereas of late times certaine persons under the names of Quakers and other names of Separation have taken up and maintained sundry dangerous Opinions and Tenents and (amongst others) that the taking of an Oath in any case whatsoever although before a lawfull Magistrate is altogether unlawfull and contrary to the word of God and the said persons do daily refuse to take an Oath though lawfully tendred whereby it often happens that the truth is wholly suppressed and the Administration of Justice much obstructed....

⁵⁶² Jones (n520)173.

⁵⁶³ Jones (n520)15.

⁵⁶⁴ 14 Chas II c.1, the full title of which is, An Act for Preventing the Mischiefs and Dangers that may arise by certain Persons called Quakers and Others refusing to take Lawful Oaths. This Act also made conventicles unlawful as discussed in Chapter Three.

The Restoration machinery effected legislation that required oaths of allegiance to the King phrased in various ways. They were required under the Clarendon Code,⁵⁶⁵ coupled with an oath of conformity to the Church of England, in respect of participation in certain civil and political matters, and from admittance to or practice of certain professions. For example:

Declaration... to be subscribed by all persons in holy Orders, and all School-masters... by all Vestrymen ...

I A.B. do declare, that it is not Lawful upon any pretence whatsoever to take Arms against the King. And that I do Abhor that Traiterous position of taking Arms by his authority against his person or against those that are commissioned by him; and that I will conform to the Liturgy of the Church of England, as it is now by Law Established.

A supplementary oath, effectively denouncing the 1643 Solemn League and Covenant, was also required whereby swearers declared that they would not *endeavour any alteration of government, either in Church or State.*

The Earl of Clarendon narrowly failed to require all male subjects to take an oath of non-resistance.⁵⁶⁶

The two Test Acts of 1672 and 1678⁵⁶⁷ were aimed at Catholics as well as dissenters and Quakers. Following Charles' mistrusted 1672 Declaration of Indulgence, state oaths began to be associated with emerging Tory Anglicanism. Thus, state oaths were originally imposed through legislation for state security and they later became employed for internal political ends.

However, I consider that the formulation and imposition of such new oaths was not simply a governmental innovation of political impetus but that it represented part of a continuum. All types of oaths, including oaths of allegiance, were

⁵⁶⁵ The Corporation Act 1661; The Act of Uniformity 1662; The Conventicles Act 1664; the Five Mile Act 1665.

⁵⁶⁶ Jones (n 520) 174.

⁵⁶⁷ 25 Car II c.2; 30 Car II st.2 c.2.

redrafted and re-invented to suit changed circumstances. This demonstrates that oaths were not simply divinely ordained but that they were used as a device. They were of fundamental importance to the political, social, legal and economic security. It is within this context that the severe effect upon Quakers for their refusal to swear is better understood.

The following section lists examples of secular and ecclesiastical oaths in order to illustrate the range of oaths that were applied beyond the better-known oaths of allegiance.

5. Oaths in Legal and Official Procedure

Legal Proceedings

Although, as we saw above, there was no difference between promissory and assertory oaths in terms of the obligations that were placed upon the swearer in relation to God, the many types of oaths had different values with regards to proof and credibility in legal proceedings. Robbins states that assertory oaths 'played a marked role in the development of a rationale of testimony.'⁵⁶⁸ This was particularly developed in the oaths commonly used in ecclesiastical proceedings. Oaths were not confined to witness testimony regarding the disputed factual matrix but extended to proof of intent and proof of costs incurred, as set out below. In ecclesiastical suits, the presentation of a libel by the plaintiff meant that the defendant (usually) had to answer the libel on oath. Defendants were not required to answer on oath in the Court of Common Pleas or King's Bench but they were in the equity courts of Chancery and Exchequer.⁵⁶⁹ Oaths were also employed in assizes, to which Quakers were frequently called. Juries heard testimony from plaintiffs and defendants (except in criminal cases) under oath although it is less clear exactly what that oath was. Juries' oaths included the words *I will present the Truth, the whole truth and nothing but the truth, so help me God.*

⁵⁶⁸ Robbins (n558) 304.

⁵⁶⁹ Craig Horle, *Quakers and the English Legal System, 1660-1685* (University of Pennsylvania Press 1988) 43.

By the seventeenth century, a range of exceptions and provisions as to when a particular oath could be administered had developed.

Oaths in Ecclesiastical Causes

Introduction

In mid-seventeenth century ecclesiastical proceedings, there were at least fifteen oaths, the legitimacy of which was confirmed in Article 39 of the Articles of Religion of the Church of England, 1562.⁵⁷⁰

The giving of every oath had to be warranted by an Act of Parliament or by the common law from *time out of mind*.⁵⁷¹ Burn indicates that English ecclesiastical courts developed their own customs with regard to administering particular oaths so as to, on occasion, depart from the standard canon law. Also, gradually, Parliament restrained canon law in relation to oaths given to laymen. This is an area where the secular law's incursion into ecclesiastical judicial authority is evident. However, that is not to say that this inevitably led to its decline, for oaths related to the veracity of issues, standards of proof of evidence, and credibility of witnesses rather than ecclesiastical power. Consequently, once ecclesiastical courts were up and running again, the several oaths that were in regular use in the matters over which the courts had jurisdiction were necessarily tendered to the parties. This meant that, in any given ecclesiastical matter, Quakers were penalised when they refused to swear them.

For example, ecclesiastical court procedure required an oath in relation to probate. The church courts had power to transfer rights of executorship or administration of a will to someone prepared to take the oath. The importance of this for Quakers was that they could lose such rights.

⁵⁷⁰ The source for this section is Richard Burn, *Ecclesiastical Law* (H Woodfall and W Strachan 1763). Burn surveys ecclesiastical oaths generally and points out those which had become obsolete and those still in force.

⁵⁷¹ 2 Inst 73 (cited by Burn, *ibid* 4).

Canon law provided for Jews and Muslims to swear oaths on the Old Testament and the Koran respectively.⁵⁷² Given this, it was theoretically possible for canon law to have accommodated Quakers, which it later did.⁵⁷³

There was an array of oaths whose desuetude was reversed upon the ecclesiastical courts' restoration. Significant ones are summarised below.⁵⁷⁴ The specificity of oaths in ecclesiastical causes evinces a certain sophistication in canon law, notwithstanding their courts' cumbersome procedures. In particular, it will be seen that oaths were required in relation to the veracity of legal claims. This reflects the theory that the 'bringing of a false legal action offends conscience.'⁵⁷⁵

Oath ex officio

The ex officio oath had originated from Archbishop Boniface's canon:

Laymen shall be compelled by excommunication, if needs be, to take an oath to speak the truth, when enquiry shall be made by prelates and judges ecclesiastical, for the correction of sins and excesses. ⁵⁷⁶

As we saw in Chapter Three, it was prohibited by the Ecclesiastical Jurisdiction Act:⁵⁷⁷

it shall not be lawful for any person exercising ecclesiastical jurisdiction, to tender or administer to any person whatsoever, the oath usually called ex officio, or any other oath, whereby such person to whom the same is tendered or administered, may be charged or compelled to confess, or accuse, or purge him or herself of any criminal matter or thing whereby he or she may be liable to censure or punishment.

⁵⁷² Burn (n570) 13.

⁵⁷³ Burn (n570) 13.

⁵⁷⁴ Burn also cites *diverse other oaths*, including the more well-known oaths of allegiance and absolution from excommunication (n570) 12.

⁵⁷⁵ Norman Doe, *Fundamental Authority in late Medieval English Law* (Cambridge University Press 1990)148.

⁵⁷⁶ Lind 109 (cited by Burn (n570)).

⁵⁷⁷ 13 Car 2 c.12.

It had already been restricted under James I to the effect that ecclesiastical ordinaries could not constrain anyone to swear generally unless the articles upon which he was to be examined were delivered to him. Its use had been abolished in criminal cases in 1641 under 16 Car 1 c.11.

Goulson v. Wainwright (1668) held that a prohibition could be obtained if the ecclesiastical court sought to administer the ex officio oath for a criminal matter but not in a civil matter. The ex officio oath could not be given to laymen except in matrimonial and testamentary causes, *grounded upon great reason: for laymen for the most part are not lettered, wherefore they may easily be inveigled and intrapped ...*⁵⁷⁸

However, ecclesiastical courts had continued to make the accused swear as to the truth of common fame, that is, the report of the charges, rather than the truth of the charges themselves. If the fame was denied, the defendant had to produce compurgators to support his denial. Refusal to swear to this was regarded as confession of guilt.⁵⁷⁹

In 1679, *Herne v Brown*⁵⁸⁰ held that *where the course of the ecclesiastical courts hath been to receive answers on oath, they may still receive them*. This case concerned a suit for payment towards the repair of a church. The defendant's offer to answer the charge, but not on oath, was refused and so he sought a prohibition against the church court's proceedings. It was refused on the basis that the Chancery court customarily required an oath in such circumstances.⁵⁸¹

Oath of Calumny

This was an oath as to the truthfulness of a cause, taken by both the plaintiff and the defendant, and administered at the outset of contested proceedings:

⁵⁷⁸ 12 Co. 26 (cited in Burn (n570) 5).

⁵⁷⁹ Colin Chapman, *Ecclesiastical Courts, Their Officials and Their Records* (Lochin Publishing 1992) 48.

⁵⁸⁰ T. 31 Car.2 (cited in Burn (n570) 5).

⁵⁸¹ Gibs 1011; 1 Ventr 339 (cited in Burn (n570) 5).

You shall swear that you believe the cause you move is just: That you will not deny anything you believe is the truth, when you are asked of it: That you will not (to your knowledge) knowingly use any false proof: That you will not out of fraud request any delay, so as to protract the suit: That you have not given or promised any thing, neither will give or promise anything, in order to obtain the victory, except to such persons, to whom the laws and canons do permit: So help you God.

A plaintiff who refused the oath would lose the case. A defendant who refused was taken to have confessed.⁵⁸²

The Clergy, *being presumed to be learned men*,⁵⁸³ were almost always required to take it, unless there were criminal ecclesiastical proceedings.⁵⁸⁴

In England, laymen were exempted except in matrimonial or testamentary cases because *contracts of matrimony, and the estates of the dead, are many times secret and do not concern the shame and infamy of the party...*

This oath could be taken voluntarily, but writs of prohibition could be directed to sheriffs to prohibit ecclesiastical ordinaries from calling laymen to the oath of calumny against their will.⁵⁸⁵

Oath of Truth

This was a separate oath to that of calumny with different effects. It was sworn by either the plaintiff or the defendant as to the truth of a libel or allegation, to make a true answer of his knowledge as to his own fact, and of his belief of the fact of others. Burn said that this oath was not decisive, and either plaintiff or defendant may proceed to other proofs, or prove the contrary to what is sworn. This relates to the question of whether an oath was a form of proof per se.⁵⁸⁶

⁵⁸² Athon 60 cited in Burn (n570).

⁵⁸³ 2 Inst.657 cited by Burn (n570)7.

⁵⁸⁴ Because the Acts held that the oath of calumny could be evidence against them in such proceedings at common law. 2 Inst.657, 12 Co.27 cited in Burn (n570).

⁵⁸⁵ 2 Inst.657, 12 Co.26, Gibs.1011, cited in Burn (n570).

⁵⁸⁶ Barbara Shapiro 'Oaths, Credibility and the Legal Process in Early Modern England: Part One' [2013] 6/2 Law and Humanities 145-178; and 'Oaths, Credibility and the Legal Process in Early Modern England: Part Two' [2013] 7/1 Law and Humanities 19-54.

Oath of Malice

By this oath, the party swore that he did not propose a matter out of malice or with intent to unnecessarily protract a cause. It could be administered at the ecclesiastical judge's discretion at any time during proceedings, with or without the parties' consent, presumably where the judge had doubts about the particular party's intention.

Suppletory or Necessary Oath

This was quite complicated. It depended upon there being a case which was half proved (*sempilena probatio*). If a case was fully proved, it was not necessary. Conversely, if the evidence did not amount to half proof, the oath could not be put. The oath was not evidence per se but confirmation of the evidence, *and if that evidence does not amount to a half proof, a confirmation of it by the party's own oath will not alter the case.*⁵⁸⁷

It is more easily understood by reference to the 1717 decision of the court of delegates in the case of *Williams v Lady Bridget Osborne*.⁵⁸⁸ The factual issue concerned whether Mr Williams was married to Lady Osborne. The church minister initially stated, *extra judicially*, that he had married them, but he subsequently denied this on oath. Burn says that, because of the variance of evidence on both sides, the ecclesiastical judge, at first instance, exercised his discretion to require the suppletory oath of Williams to the extent that he was really married as stated in his libel and articles, as to which Lady Osborne appealed.

The issues on appeal for the delegates were:

- i. whether the suppletory oath ought to have been administered in any case to enforce a half proof? It was held that, although ordinarily the common law would not allow a person to be witness in their own

⁵⁸⁷ Burn (n570) 9.

⁵⁸⁸ Burn (n570) 9. This provides a detailed account of the case. Whilst the decision post-dates the research period, this oath was in use in the Restoration and the issues upon which the delegates had to adjudicate would have been pertinent.

cause,⁵⁸⁹ the half proof practice was allowed by canon and civil law, and so, in a cause of ecclesiastical cognizance, the civil not the common law governed the proceedings.

- ii. If the half proof practice had been correctly applied? If so, was the evidence sufficient to amount to a half proof so as to entitle Williams to pray that his suppletory oath might be received. The delegates held that, although there was no positive evidence, but only circumstances, confessions, letters and *unusual familiarities*, this amounted to half proof and so the Dean of the Arches had been correct in administering the suppletory oath.⁵⁹⁰

This oath was pleaded by exhibiting a schedule containing, in the party's own writing, that which is proved as more than half proof, and the half proof. They then took the oath to speak the truth of their own certain knowledge.

Oath in animam domini

This allowed the proctor, by virtue of his special proxy, to take the oath of calumny, so he could swear *in animam domini*, upon the soul of his client.⁵⁹¹ There was an exception under Canon 132 in relation to testamentary and intestate cases. Quakers were advised by legal counsel to make use of this so as to avoid their having to swear an oath themselves directly.

Oath of Damages or ad litem

This related to the plaintiff's estimate of his or her damages.⁵⁹² The oath was not, in itself, conclusive proof of quantum because the judge could moderate the damages.

⁵⁸⁹ Except for robbery which was presumed to be secret and so the witness was allowed to be witness for himself.

⁵⁹⁰ Str 80 (cited by Burn (n570) 11).

⁵⁹¹ Wood Civ L.298 (cited in Burn (n570) 11).

⁵⁹² Wood Civ L.314 cited in Burn (n570) 11.

Oath of Costs

The parties had to swear that legal costs and expenses in obtaining a sentence or decree were necessarily incurred in pursuing the claim.

Oath de pardo jui and stando mandatis ecclesia in forma juris

This related to absolution from excommunication.⁵⁹³

Oaths of Office

The Book of Oaths, intended for JPs⁵⁹⁴ and published in 1689, set out oaths that could be administered for numerous different purposes. It comprised a compendium of oaths existent from the medieval period up until the time of William and Mary. Around three hundred oaths could be administered across the whole social and professional hierarchy. Oaths functioned effectively as a means of professional regulation in the seventeenth century, in the absence of any clear, enforceable statutory regulation⁵⁹⁵ or certification. These included, for example, those to be administered by bishops upon licensing of professionals, and to those with responsibility for highways and weights and measures.

The imposition of professional obligations by way of oath indicates a developed and sophisticated understanding of personal, political and subjective motivations and conflicts.

Sample sections of such oaths are cited below.⁵⁹⁶

The Oath of an Ale Taster within a Leet.

You shall well and truly execute the Office of Ale-Taster within this Leet, you shall see that all Victuals, Bread, and Beer put to sale within this Leet, be sweet and wholesome, and of full weight and measure, and you shall in all other things

⁵⁹³ Excommunication is dealt with in Chapter Eight.

⁵⁹⁴ Richard Garnett, *THE BOOK OF OATHS AND THE Several Forms Thereof* (London 1689) (Lambeth Palace Library ref. 060.02G2).

Also cited by Barbara J Shapiro (n581) 'Oaths, Credibility and the Legal Process in Early Modern England: Part One' [2013] 7/1 Law and Humanities 19-54.

⁵⁹⁵ A I Ogus 'Regulatory law: some lessons from the past' [1992] 12/1 Legal Studies 15.

⁵⁹⁶ The full texts are in the Appendix.

execute the said Office of Ale taster within this Leet, according to the best of your skill and knowledge.

A jurywoman charged with determining whether a prisoner was 'quick with child' was subject to a prescribed oath. There were different types of oaths taken by office holders, such as constables, based in London as opposed to the rest of the country.

The form of oaths for JPs was as follows: ⁵⁹⁷

Ye shall swear, That as Justices of the Peace in the County of...you shall do equal right to the Poor, and to the Rich... and after the Laws and Customs of the Realm.... [And ye shall not be of Counsel of any Quarrel hanging before you...And the Issues, Fines, Americiaments that shall happen to be made, and all forfeitures which shall fall before you shall cause to be Entred without any concealment or (imbezilling) and truly send them to the King's Exchequer. Ye shall not let for gift or other cause, but well and truly ...do your Office of Justice of the Peace.... And that you take nothing for your Office of Justice of the Peace to be done, but of the King, and Fees accustomed, and Costs limited by the Statute. And ye shall not direct ... any Warrant (by you to be made) to the parties, but ye shall direct them to the Bayliffs of the said County... or other indifferent persons to do Execution thereof. So help you God...

The first two of fifteen items to which midwives were required to swear are contained in: The Oath that is to be administered to a Midwife by the Bishop or his Chancellor of the Diocese, when she is licensed to exercise that Office of Midwife:⁵⁹⁸

- i. *That you shall be diligent and faithful, and ready to help every Woman labouring of Child, as well the Poor as the Rich; and that in time of necessity, you shall not forsake, or leave the Poor woman, to go to the Rich.*

⁵⁹⁷ W Lambarde, *Eiremarcha: or of the Office of the Justice of the Peace* (London 1581) 57-58 (as cited in Norma Landau, *The Justices of the Peace 1679-1760* (University of California Press 1984) 335.

⁵⁹⁸ The Book of Oaths (n594) 191.

- ii. *You shall not suffer any Woman's Child to be murdered, maymed, or otherwise hurt...; and so often as you shall perceive any peril or jeopardy, either in the Woman or the Child, in any such wise, as you shall be in doubt what shall chance thereof you shall henceforth in due time send for other Midwife, and expert Women.*

Jones observes ⁵⁹⁹ that, in England, by contrast with the continent, juries, as well as churchwardens and other lesser officials, were required to swear oaths, and that this 'upheld the structure of local government.'⁶⁰⁰ This supports Hill,⁶⁰¹ who observes that many oaths were part of everyday official and judicial routine. Jones also asserts parliament's increased reliance upon and use of oaths for the maintenance of social stability during the Restoration. This was a very important feature for local governance, although I consider that he overstates oaths as 'the only alternative to a military force,'⁶⁰² both because oaths, as they came to be used to enforce loyalty, could not perform as physical force and because this section also fails to acknowledge the 1661 Militia Act, which introduced county-based, rather than national armies and over which, as Jones later acknowledges,⁶⁰³ Charles II had authority.

The role of the grand jury was to investigate potential criminal charges and determine whether they should be brought on the basis of prosecution evidence – by informers under the relevant Acts – and in private. The importance of their role in itself and in relation to the actual trial, or petit, juries' role is illustrated by their respective oaths which were administered in assize and quarter sessions:

- i. *You shall diligently inquire and true Presentment make, of all such Matters... as shall be given you in Charge, or shall come to your knowledge, concerning the present Service. The King's Counsel, and your Own, and your Fellows, you shall ...truly keep secret. You shall present nothing for malice, Lucre, Ill-will; nor leave anything unrepresented, for*

⁵⁹⁹ Jones (n520) 32.

⁶⁰⁰ Jones (n520) 32.

⁶⁰¹ Hill (n521)332.

⁶⁰² Jones (n520) in the context that parliament would not approve a standing national army.

⁶⁰³ Jones (n520).

Love, Favour, or Affection, Reward, or any hope thereof; but in all things that concern this present Service you shall present the Truth, the whole Truth and nothing but the Truth. So help you God.

- ii. *You shall well and truly try, and true deliverance make, between our Sovereign Lord the King, and the Prisoner or Person at the Bar, according to your Evidence. So help you God.*

A Henrician act of attain⁶⁰⁴ allowed a person wrongly convicted of an untrue verdict to bring an attain and recover damages against the person giving such a verdict in party and party cases. Doe shows that it was established from late medieval times that if jurors ‘found in their conscience’ that what a party said was true, ‘they could give their verdict in conscience.’⁶⁰⁵ The exco⁶⁰⁶ of grand juries in relation to indictments against Quakers found under the statutes against popish recusants by the author of *Tam Quam: An Attain*,⁶⁰⁶ highlights this matter as well as some practical contemporary issues that were of concern in relation to the nature of juries’ oaths.

Miscellaneous Oaths

Proof of a will required an oath, as did certain landholding and commercial activities. The Burial in Woollen Acts of 1666, 1678 and 1680,⁶⁰⁷ which were introduced by Charles II to bolster the wool trade, stipulated that an affidavit of compliance had to be sworn that the burial was in wool rather than linen or another substance. This is an instance of the use of swearing – as opposed to mere certification – to enforce adherence and monitor compliance with legislation.

Several oaths were required in relation to trading. The following shows that the form and content of oaths was subject to review:

19th August 1673.

⁶⁰⁴ 23 Hen VIII c.3

⁶⁰⁵ Norman Doe, *Fundamental Authority in Late Medieval English Law* (Cambridge University Press 1990) 147 and authorities cited in footnote 68.

⁶⁰⁶ *Tam Quam* (n534).

⁶⁰⁷ 18 Car II c.4; 29 Car II c.3; 32 Car II c.1.

This court considering that several of the Oathes which have heretofore been administered to the Officers of this Citty are nowe very unreasonable and unfitted to be administered to any person whatsoever, doe thinke fitte and order that all my Masters, Aldermen ...and the two which are next below ...be a Committee to peruse the Book of Oathes and consider what is fitte to be continued and what to be wholly put out of every Oath. ⁶⁰⁸

This section has provided examples of the many oaths that were in common use in the mid-seventeenth century and how they were required for a wide range of legal and official proceedings. This, therefore, demonstrates how Quakers' refusal to swear was of social and legal significance.

6. The Consequences for Quakers of their Opposition to Oaths

Introduction

As we saw in section 4, due to the oaths' role in confirming political loyalty in the early stages of the Restoration, Quakers were viewed by some authorities at worst as enemies of the state, and at least as a potentially de-stabilising movement. They became notorious for their refusal to swear the oath of allegiance, despite the measures that the government introduced to try to compel this. The effects, when they plunged into this controversial arena, were both corporate and individual.

The consequences of refusing to take an oath depended upon the type of oath and the type of proceedings. Given that the Clarendon Code restricted the exercise of a profession to those who would swear the oath of allegiance and supremacy and conform to the Church of England, it is probable that their numbers included former professionals, who were unable to practice. For example, Richard Smith who was excommunicated, and a thorn in the side of

⁶⁰⁸ *Rep, Harrison No.78 fo. 247* Quaker Archive: MS Box E3/10 comprises a collection of oaths mainly for holding office in the Court of Aldermen for the City of London (the entries in the collection starts from the 1500s). It seems curious that Quakers held this when they refused oaths and were excluded as Aldermen. However, an eighteenth-century entry shows that they were seeking to be freemen of the City of London, by which time an accommodation for their position on oaths had been reached. It is possible that the compilation was made at that time.

Chester magistrates for persistently flouting the Conventicles Acts⁶⁰⁹, is referred to as a 'former surgeon.' It is likely that former teachers were unable to continue teaching. Quakers would be prevented from engaging in certain employment or of exercising a particular office such as constable, midwife, and so on.

Quakers sought legal advice on various issues that arose.⁶¹⁰

A Richard Barnett had refused the oath on being elected constable. Corbett advised that *JPs are not empowered to enquire if sworn*. He also advised that JPs had no jurisdiction regarding the oath of abjuration since their jurisdiction derived from statute law. *They were created by 1 Eliz 16 and their authority enlarged by other statutes*. There was a particular concern that Quakers were liable *...upon refusal to confirm or abjure after conviction to suffer death without [benefit of] clergy?* Corbett again advised that JPs lacked jurisdiction and: *no other court... other than King's Bench which hath a general jurisdiction to hear and determine all criminal matters touching life and death or at least Justices of Oyer and Terminor*.

Counsel cited a couple of cases on this point, including that of Thomas Smith who had been convicted in Surrey, and upon representation to that effect from counsel of Grey's Inn *it was agreed the JPs had no jurisdiction and Smith was discharged*.

However, refusing an oath could not only result in exclusion from public office, or inability to take part in legal proceedings, but could escalate a minor misdemeanour into dangerous territory.

By 1675, Penn's petition pleads that Quakers had endured *...frequent and heavy Sufferings by Fines and tedious Imprisonments, sometimes to Death itself ...*

and they had encountered the legal disabilities attendant upon refusal to swear:

...it would please you to consider how deeply we have already suffered, in Person and Estate, the Inconveniences we have daily to encounter, and

⁶⁰⁹ Chapter Three.

⁶¹⁰ Book of Cases, YM/MfS/BOC/1 35 and 157 (Quaker Archive).

those Injurious not only to ourselves, but others we commerce with, in that both they and we, because of our Tenderness in this Matter, are constantly at the Mercy of such as will Swear any thing to advantage themselves, which they are sure that a Contrary Evidence shall be by Law esteem'd (however True) Invalid.

Numbers 30:2-10 proscribed the taking of an oath by a woman without the consent of her husband or father. Under such biblical authority, Jones therefore says that women were rarely a direct target of state oaths.⁶¹¹ This may be historically correct as a general statement but, in the period at issue, Quaker women were made direct subjects of the requirement to swear oaths and of the penalties that followed refusal. Examples of this are found not only in the famous trial of Margaret Fell in 1664, but in the experience of ordinary Quaker women, some of whom feature as defendants in the summary of local proceedings below. This is partly because Quaker women asserted themselves in activities which brought them into the public domain. On the other hand, there is evidence that pressure was put upon local Quaker women by the Quaker leaders.⁶¹² Morgan cites Emy Hodgson, a member of Swarthmore Meeting, who, in 1680 having sworn to burial in wool in compliance with the Act, was ordered by the meeting to write a paper denying her actions, and to present it to the court where she had sworn.⁶¹³

Conscientious objection to oaths, as with tithes, constituted such a fundamental part of Quaker testimony that the leadership saw adherence as essential to maintaining cohesion of the Society of Friends. This was notwithstanding the fundamental role of oaths in seventeenth century society and legal processes. Leading Quakers thereby encouraged their members to engage in overturning social norms and settled legal procedures.

⁶¹¹ Jones (n520) 94.

⁶¹² The issue of pressure to maintain Quaker testimony is also discussed in Chapter Seven.

⁶¹³ SWMMM, vol.1 11/12/1678, 11/1/1678-9, 6/3/1679 and LSF, Dix MSS.F2 cited in Morgan N, *Lancashire Quakers and the Establishment 1660-1730* (Ryburn Academic Publishing 1993) 121 and footnote 66.

The prominence given to the Quakers' collective refusal further demonstrates the importance of oaths in this period.

Local Experience

The instances of legal proceedings in the region against Quakers who refused oaths are listed chronologically because this illustrates the effects of the application of the various laws relative to oaths at the various times throughout the Restoration. There are distinct clusters of proceedings. Notably, records of proceedings for oaths per se appear to decrease after 1660, notwithstanding the Quaker and Conventicles Acts. De Krey⁶¹⁴ argues that the years 1667-1672 were critical in relation to the political issue of dissent. In the 1680s, there was a savage surge of proceedings, which is discussed more particularly in the following chapter.

An important caveat regarding an analysis of the numbers of proceedings relating to oaths is that, in very many cases, oaths formed part of a different substantive claim, and proceedings against Quakers for refusal were often conflated with other offences. This is particularly apparent in the proceedings for breaches of the Conventicles Acts and Elizabethan and Jacobean legislation for not attending church.

The database of Besse's records of proceedings against Quakers involving oaths alone contains a total of 364 proceedings over the twenty-five-year period. In most cases, the specific oath is not identified and has to be gleaned from the context. Having surveyed the range of applicable oaths, it is not necessarily the case that all such matters derived from refusal of the oath of allegiance. The instances cited below are those where refusal of the oath appears to have been the driver of legal procedures. These are taken predominantly from Besse's account but the list also contains a small number of other sources that I have researched.

⁶¹⁴ De Krey (n541).

The combination of the Lancashire experience with that of Westmoreland and Cumberland, confirms the pattern in Morgan's table, which was based on Lancashire alone.⁶¹⁵ However, Morgan references refusal of the following types of oaths as causes of sufferings: the oath of allegiance and oaths relating to trade, holding office and so forth.⁶¹⁶ He does not mention ecclesiastical oaths. Difficult though it is to accurately identify them, there are certain entries in Besse, particularly in relation to tithes, where an oath in ecclesiastical proceedings had been put and declined.

1660.

Quakers were rounded up en masse because of their refusal to swear oaths of allegiance. There were 270 proceedings overall in 1660, all of which resulted in imprisonment. The majority of these were in January, in the uprising crushed by General Monck. The courts are not specified except for two in quarter sessions. In one, Besse records that a priest had made unsubstantiated allegations against James Smith of Poulton, in Lancashire, about *fear of peace*. The second case involved John Lawson who was imprisoned for refusing the oath in January and March 1660. Twelve Quakers had their way blocked by armed men as they left a meeting. Despite no substantive offence being proven, they were imprisoned when they refused an oath. Eight Quakers, including four women, were apprehended by a constable at a meeting and detained overnight. Save for one man, James Whipp, no other proceedings are recorded against these individuals. In other words, the only reason for the imprisonment was refusal of the oath. At this point in time, the prevailing legislation was 7 Jac.1.c.6., which required persons over eighteen to take the oath of allegiance if so required by two JPs. Their apprehension was occasioned by their meeting together which was deemed to be seditious.

1661.

Fifteen proceedings, all of which resulted in the imprisonment of Richard Madder, Edward Lord, Ralph Ridgeway, Nehemiah Poole, Edward Dawson, James

⁶¹⁵ Morgan (n613) 122.

⁶¹⁶ Morgan (n613) 120.

Bold, John Alread, John Blinkborne, Henry and John Wood, John Abraham, Issac Mosse, and Abraham Garside. Besse's account ⁶¹⁷ is:

as they were coming out of a Meeting found the Passages blocked beset with armed men, who would not suffer them to depart till some Justices of the Peace came, who tendered them the Oath of Allegiance, saying, that the law had appointed that as a Means to discover Papists, and upon their Refusal to take it sent them to Lancaster Gaol.

There was also a well-known petition⁶¹⁸ from about 50 Quakers who were imprisoned for meeting and refusing the oath.

1662.

Ten proceedings. Seven resulted in imprisonment. Three resulted in fines of which two cases were determined in a manor court. It was illegal to administer the oath of allegiance in such courts but the manor court would have jurisdiction over a fine, most likely imposed by a JP following the imposition of an oath elsewhere. There are several more instances of such proceedings in local manor courts. The significance of this is that it shows how Quakers were readily affected by petty local proceedings conducted by the local JPs in which their jurisdiction was open to manipulation.⁶¹⁹

1663.

Twenty proceedings. Twelve resulted in imprisonment following prosecution in assizes, and eight in distraint of goods. Three of these involved significant Quakers, Margaret Fell, George Fox and Francis Howgill, following the direction to pursue the leaders.

1663 was the year of the suspected great Northern plot which greatly increased the level of suspicion on Quakers locally. ⁶²⁰

⁶¹⁷ Besse (Sessions Trust 2000) 309.

⁶¹⁸ QSP 217/2f Lancashire Quarter Sessions Petitions Epiphany 1661/2.

⁶¹⁹ This is further explored in relation to tithes in Chapter Seven.

⁶²⁰ Chapter Three details this.

The Quaker Act was in force at this time. However, according to Margaret Fell's account of the trial⁶²¹ no formal indictment was put to her.

1664.

Margaret Fell, Fox and Howgill were imprisoned and praemunired at assizes due to their intransigence. Margaret Fell again challenged the original indictment as showing no cause of action other than refusal of an oath of allegiance, despite their willingness to confirm their loyalty to the King. Judge Twysden's dialogue with Margaret Fell in Lancashire assizes in 1664⁶²² is a case in point regarding discretion to tender the oath of allegiance. He was evidently conscious of the legal consequences for her should she maintain her refusal. He offered her release if she would only take the oath; or, alternatively, not put the oath to her if she agreed not to hold meetings, but she held out against both.

Fox was sent to Scarborough prison where he was incarcerated until freed by an order of King and Council on 1st September 1666. Howgill was outlawed; the prosecutor was Daniel Fleming. Howgill died in prison in 1671.

The relatively sparse number of legal proceedings that were deemed to constitute sufferings that Besse records for the years 1663-4 is not conclusive. Fleming's papers⁶²³ refer to Lancaster sessions on 23rd April 1664. Quakers:

... refused the oath of allegiance the second time without submitting themselves.... and now continuing prisoners...

He continues: *Sir, some of these Fanaticks have of late conformed...but the generality of them are still very persisting.* Although proceedings for oaths were conflated with meetings in this account, it does indicate that there were more cases involving oaths. It also indicates that some ordinary Quakers may have compromised, particularly when they faced more severe penalties.

A letter from William Grave pleaded with Fleming⁶²⁴ for mercy (vainly):

⁶²¹ Margaret Askew Fell, *The Examination and Tryall of Margaret Fell and George Fox* (1664) Early English Books Online.

⁶²² Besse (Sessions Trust 2000) 312-4.

⁶²³ WDRY/5/601 (Cumbria Archive, Kendal).

... for if I could take any oath I should be willing to take the Oath of Allegiance ... I hoped I might have my libertie in this last sessions you who are a neighbour and know...my manner of life ... I should have the law inflicted upon me... for I am a man of tender conscience and dare not... the Lord knows my heart no other ... I should suffer the loss of all and imprisonment during my life ...

1665.

Thirteen proceedings in this year, eleven of which followed the enactment of the Conventicles Act 1664. William Clayton was imprisoned, prosecuted in quarter sessions, and sent to a house of correction. He was placed in a dungeon for five days until local people secured his release until the next quarter session. According to Besse, he was arrested by a priest. Nine others were imprisoned; the remainder were fined and their goods distrained. One of these, John Berley, of Lancaster was fined £11s 8d and suffered the loss of 15 sheep for his refusal to swear. Another, John Townson, refused to swear when chosen as a constable and lost a cow worth £4.

Fleming's account of Kendal quarter sessions dated 16th October 1665⁶²⁵ also records one instance of refusal of an oath by a Quaker...*upon the same Act against Quakers.*

1668.

The JP and Lord of the Grayrigg Manor, James Duckett, fined two people for refusing to swear an oath.

1672.

The case study of appeals against excommunication in Chapter Eight refers to the vicar, William Brownsword, having to swear to the truth of his allegations and the Quakers, similarly, in their answers. It is unclear which oaths are referred to here. In theory, they could each have been liable to different ones. The ecclesiastical oath of truth applied, but Brownsword would have been subject to

⁶²⁴ WDRY/5.

⁶²⁵ WDRY/5/5709.

the oath of calumny. Besse records that once the Quakers refused their oath the proceedings stalled until Brownsword died.⁶²⁶

1675.

Following a visitation, Heskin Fell was subject to ecclesiastical proceedings for refusing Easter-offerings and prosecuted in Chester consistory court where he refused an oath and, consequently, he was pronounced contumacious by two JPs, (which must have followed a referral at the instigation of the ecclesiastical authorities⁶²⁷) and imprisoned.

1678.

Roger Longworth had travelled from Lancashire to Cheshire and was imprisoned for two months under the 'popish recusancy' laws by JP Mainwaring for refusing an oath.

1680.

Eight proceedings were brought in this year. Six individuals, John Saul, Thomas Splatt, John Ostell, John Barne, John Graham and John Bell, were prosecuted in a manor court for refusing the oath tendered for jury service. They were fined and had their goods distrained. Elizabeth Bond, Thomas Dobinson and John Richardson, all from Scotby, were brought before the Exchequer for refusing *the oath against popish recusants*.⁶²⁸ All were fined and their goods were distrained. Besse notes that people refused to buy Dobinson's *spoils of conscience* in Carlisle market.⁶²⁹

Fleming's papers⁶³⁰ indicates that a warrant was issued on 18th March 1680 in quarter sessions referring to the:

⁶²⁶ As we saw in Chapter Two, this would have been because of canon law required appeals to be renewed each year.

⁶²⁷ This is explored in Chapter Eight regarding Excommunication.

⁶²⁸ The Acts against Popish Recusants are specifically discussed in Chapter Six.

⁶²⁹ This was not an isolated or localised reaction.

⁶³⁰ WDRY/31 Quaker Forms (Cumbria Archive, Kendal).

Oath of (Supremacy and Allegiance) and the provisions of the Five Mile Act... This Court doth hereby order that the High Constables within the Barony of Kendal shall forthwith issue out their warrants to the Constables, Churchwardens and Overseers of the poor within their several wards especially requiring them to be very active and diligent... and in giving Informations against them unto JPs that such offenders may be proceeded against according to the law. If they wilfully fail, fines of £5 for each offence according to the Act of Parliament in that behalf made and provided. Officers fail at their peril.

1681.

John Thirnbeck of Middleton and Joseph Baines of Killington refused to take the oath tendered for jury service. They were fined 20 shillings each and had goods worth 40 shillings and £2 10s respectively taken away. Thus, refusal of any oath could lead to steep fines.

1684.

Eighteen proceedings were brought. Twelve of these involved defendants who had withheld tithes and then refused to answer on oath to the proceedings in the ecclesiastical court. They were all excommunicated and imprisoned, presumably for their contumacy.⁶³¹ The prosecutor was Edmund Ashton and these proceedings are also mentioned in my chapter on tithes.

Two further proceedings resulted in imprisonment. Ellen Pollard and Edward Satterthwaite had refused the oath in a trial of title to an estate connected to the commission of rebellion.

Three more were brought in a manor court, resulting in distraint. One of these involved John Caipe of Uldall, a man refusing, under the compulsion of Swarthmore meeting, to swear that his wife had been buried in wool.⁶³² He suffered distraint of £2 10s.

1685.

⁶³¹ See Chapter Eight, for the procedure for imprisonment following excommunication.

⁶³² as required under the Burial in Woollen Act, 1680.

One case of refusal to swear was brought in a manor court, resulting in distraint of goods.

The above summaries illustrate, not only the scale and speed of proceedings and associated legal penalties, but also the range of oaths tendered in different fora for which Quakers suffered upon their refusal to swear.

6. Conclusion

This chapter has explored the broad legal context to Quakers' refusal of oaths. It has shown that the issue was not confined to oaths of allegiance or disrespect of authority, nor was it connected to a general diminution in the importance of oaths in the seventeenth century. The ultimate decline in the use of oaths may be traced back in part to philosophical and economic developments that emerged during the course of the seventeenth century. There were legitimate criticisms of the use of, and requirement for, oaths as well as casuistic objections to the binding nature of these upon conscience, and scepticism as to their power to produce truthful testimony. However, I believe that, in the mid-seventeenth century, it is apparent from the foregoing that oaths were not in decline.

The proliferation of texts for and against oaths, of which those quoted from Penn, Selden and others are merely samples, in this period tends to support that assertion.⁶³³ If oaths were already on the decline, there would have been no need for the fervent debate that surrounded them. Morgan⁶³⁴ also makes the point that oaths proliferated in this period. As we have seen, the precise wording of oaths was subject to review and they were employed for various means and ends.

It becomes clear from examining theory, that Oaths, through their connection to God's essence as truth, were deemed vital to social cohesion. Quakers separated themselves from the norms of social behaviour and, in an era in which law was

⁶³³ Robbins (n558) 314 notes that early Restoration pamphlets and sermons were full of reflections on oaths, and ballads mocked them.

⁶³⁴ Morgan (n613) 115.

predicated upon its formulaic writs and styles, that included oaths, their conscientious objection represented a fundamental challenge. This was not confined to oaths of allegiance as can be deduced from Section 5, which illustrates how oaths were regarded as the foundation of truthful testimony in legal cases and to bona fides, or what might be termed regulation, of professional activity.

The accounts of proceedings against Quakers in Section 6 show that both they and the secular and ecclesiastical judges were aware of the immediate and potential consequences of a refusal to swear an oath. The administration of an oath was a deliberate tactic on the part of certain prosecutors who regarded Quakers' refusal to swear oaths as an undermining of the judicial process, state security or an irritating defiance of judicial authority which was deemed to require swift correction. I consider that the examples show that it is in the administration of oaths that the authorities demonstrated caprice because the tendering of the oath was largely discretionary.

Besse states, in relation to oaths, that Quakers *were acted by an invincible Constancy; and supported steadfast in the Faith, through Bonds, Imprisonments, Banishments and even death itself*.⁶³⁵ Such constancy was enforced by the leadership, and encouraged group cohesion. There are indications that some Quakers were prepared, especially under severe pressure, to succumb. It may be that Penn's reiteration against expedient swearing, cited in Section 3, drew upon that. Persistent refusal of oaths distinguished them from other non-conformists both in terms of their collective character and in the effects of this stance. It also meant that Quakers were rapidly exposed to severe legal penalties, no matter how minor the original transgression. It would also appear, from the local case summaries in section 6, that whilst many court processes, particularly the ecclesiastical ones, were so cumbersome as to render them almost ineffective as a means of dispensing justice, the courts seemed able to process trials of Quakers from first offence to imprisonment with alacrity.⁶³⁶

⁶³⁵ Besse (Sessions Trust 2000) vi.

⁶³⁶ This section is taken from my MA (Res) dissertation.

The next chapter examines praemunire which was one of the most severe penalties imposed upon Quakers that derived from their refusal of the oath of allegiance. This was connected to the Elizabethan and Jacobean legislation against popish recusants which is also discussed therein.

Chapter Six

THE LAW OF PRAEMUNIRE AND THE 'ACTS AGAINST POPISH RECUSANTS

1. General Introduction

This chapter examines, in Section Two, the law and practice of Praemunire which involved the forfeiture of a person's estate to the King, and, in Section Three, the application to Quakers of this ancient procedure. Section Four considers the extension of Elizabethan and early Stuart legislation that had been designed to restrict Catholics from avoiding allegiance to the English church and royal supremacy, to Protestant dissenters. It may seem peculiar that Quakers were penalised under anti-Catholic legislation and this was highly controversial. Section Five provides brief details of local Quakers' experience. From examining the law in both instances, I concur with the Quakers that the application of this law to them was persecutory.

2. Praemunire Law and Procedure

The law of praemunire was derived from fourteenth-century statutes, especially 27 Edw III s.1 (1353) and 'The Great Act of Praemunire 1393.'⁶³⁷ It was devised against those who acknowledged foreign jurisdiction by paying obedience to papal process rather than King's courts. Praemunire meant:

To be put out of the King's protection, and their Lands and Tenements, Goods and Chattels forfeit to our Lord the King, and that they be attached by their bodies, if they may be found and brought before the King ... there to answer to the cases aforesaid, or that process be made against them by Praemunire facias in manner as it is ordained in other statutes of provisors.

The 'Great' Statute made it an offence for anyone *which do sue in any other Court in derogation of the Regalty of our Lord the King* or obtain or sue in the court of Rome or elsewhere *any such translations, processes and sentences of*

⁶³⁷ 16 Ric II c5.

excommunications, bulls, instruments or anything else whatsoever which touches the king our lord against him, his crown, and regality, or his realm.

Praemunire consisted of several processes. The term could apply to the 'Great Statute of Praemunire, or the offence of praemunire, or the writ *praemunire facias* to 'cause A.B. to be forewarned.' and, by the fifteenth century, these three aspects were viewed as one: thus to have praemunire brought meant to be summonsed with a writ to answer for the offence.⁶³⁸

The writ was purchased from Chancery but the case could be heard in King's Bench or the Court of Common Pleas. During the fifteenth century, the words *ou aillours* (in the statute) and *vel alibi* (in the writ) were interpreted so as to include cases brought in the ecclesiastical courts.⁶³⁹

'The penalties listed in the old statutes were, by the mid-seventeenth century, treated as constituting punishment for the offender rather than as means of bringing him to the Kings court.'⁶⁴⁰ The differentiation may be significant in that it is not always clear, in the proceedings against Quakers where the term is used, at exactly what stage the proceedings had reached. Essentially, however, the penalty of praemunire involved the forfeiture of a person's estate to the King, and it could lead to imprisonment.

3. The Application of Praemunire Law to Quakers

Introduction

Originally, the statutes of praemunire were designed to protect the English and ecclesiastical courts from encroachment by papal jurisdiction.⁶⁴¹ In the sixteenth century, they were used by Henry VIII to facilitate the break with Rome and to the detriment of English clergy who may have been inclined to side with Rome.

⁶³⁸ The word *praemunire* is a corruption of the Latin *praemonere*, which translates as 'to forewarn,' Daniel Gosling, 'Church, State and Reformation: the use and interpretation of praemunire from its creation to its break with Rome'. PhD Thesis, September 2016, 58.

⁶³⁹ Gosling, *ibid* 9.

⁶⁴⁰ Alfred W. Braithwaite, 'Imprisonment upon a Praemunire, George Fox's Last Trial' [1662] 50/1 *Journal of Friends' Historical Society* 37-43.

⁶⁴¹ Gosling (n 638) 8.

Elizabethan and Jacobean legislation ⁶⁴² was enacted specifically to deal with the problem of Roman Catholic recusancy.

Praemunire became one of the measures that were taken by Elizabeth I and James I to enforce the allegiance of Catholic recusants to the English Church and the King or Queen as head of the same. The Popish Recusants Act 1603 ⁶⁴³ provided, by s.VIII:

...it shall be lawful to and for any Bishop, or any two Justices of the Peace... to require any person of the age of eighteen or above...which shall be convict or indicted ..for any Recusancy... for not repairing to Divine Service...or which shall not have received the Sacrament within the year ... and any person passing in or through the County Shire or Libertie, and unknown, ...that being examined by them upon Oathe, shall confess or not deny himself to be a Recusant, or shall confesse or not denie that he or she had not received the said Sacrament...to take the Oathe hereafter following ...which said Bishop or two Justices ...shall certifie in writing ...

Section IX prescribed the penalty. Upon refusal of the oath of allegiance, the offender could be imprisoned until the next quarter sessions or assizes. The oath was then retendered in open court. Then:

Every person so refusing shall incurre the Danger and Penalty of Praemunire mentioned in the Statute of Praemunire.

Thus, proceedings would often originate in the local courts that had tendered the oath *ab initio*. This was important for Quakers because the tendering of the oath could depend upon the attitude of the local ecclesiastical judge or JPs.

On the face of it, Quakers would be unlikely to encounter Praemunire unless they were to seek recourse to a foreign jurisdiction which was not of any interest to them. However, the Jacobean legislation rendered them liable to the risk of praemunire. Quakers could be caught twice by the provisions outlined above, firstly, because they would not swear an oath as to recusancy and so were

⁶⁴² 23 Eliz 1 c1; 29 Eliz 1 c6; 3 Jac c4.; 7 Jac c6.

⁶⁴³ 3 Jac c 4.

deemed not to have denied it, and secondly, because they would not take the prescribed oath of allegiance which followed.

When this oath of allegiance was tendered to Quakers, Braithwaite states that 'news of their refusal quickly spread among the judiciary, and almost at once it became the accepted practice for getting rid of a troublesome Quaker...in the certainty that he would refuse it, and so incur the penalties of a praemunire.'⁶⁴⁴ This comment risks overstatement in that it conflates the tendering of the oath with the penalty of praemunire. It was only the oath of allegiance that was tendered en masse. The potential liability to praemunire as a penalty, however, certainly did exist for all and the risk materialised early on. One of the first times that it was used against Quakers was at Oxford in October of 1660 when it caused consternation.

'The operation of the statutes was at the discretion of the Crown and they were apparently very little used.'⁶⁴⁵ Section VIII did not make tendering the oath mandatory. Praemunire did not form part of routine legal procedures.⁶⁴⁶ It had tended to concern high profile cases, especially ones involving clerics under Henry VIII.

Braithwaite says there is no recorded instance of a Roman Catholic having been 'discovered and repressed' under the Jacobean Act for refusing the oath and he cites John Cook's and Francis Howgill's comments on this anomaly at their praemunire trials.⁶⁴⁷ Indeed, in the 1670s parliament conducted an investigation into the application of these Acts against Protestant dissenters. This was initiated by a Quaker petition drafted by the Quaker lawyer, Thomas Rudyard.

Braithwaite⁶⁴⁸ considered the imposition of praemunire 'a gross perversion of justice.' We saw in Chapter Five how important the oath was in seventeenth-

⁶⁴⁴ William C Braithwaite, *The Second Period of Quakerism* (Cambridge University Press 1952) 40.

⁶⁴⁵ Alfred W Braithwaite (n640).

⁶⁴⁶ Although Gosling (n638) describes its use prior to Henry VIII's Act for Prevention of Appeals to Rome.

⁶⁴⁷ Braithwaite (n640) 39.

⁶⁴⁸ Braithwaite (n640) 40.

century legal processes. The imposition of a discretionary oath to those who declared loyalty but conscientiously objected to swearing an oath was manifestly unfair and victimised Quakers. The 'perversion' of the law was connected to the application of legislation that was evidently intended for a different purpose. Also, Selden argued that the concept of praemunire was, in the seventeenth century, fundamentally flawed because, by then all courts, including ecclesiastical courts, were subject to the King.⁶⁴⁹

The matter gave rise to national controversy and to tracts and pamphlets from Quakers and non-Quakers alike. Rudyard's Petition⁶⁵⁰ against the use of these Acts: *THE CASE OF PROTESTANT DISSENTERS OF LATE PROSECUTED ON OLD STATUTES MADE AGAINST PAPISTS AND POPISH RECUSANTS; The two thirds of whose Estates are Seized into the King's Hands, and the Profits thereof Levied Yearly. And many other Prosecuted for 20l. a month, to the Ruine of many Families* addressed 3 Jac c.4, in particular, by citing its preamble. This makes clear that the mischief to be addressed stemmed from the Gunpowder Plot:

*... it is found by daily experience that many his Majesties Subjects that adhere in their Hearts to the Popish Religion ...and by the Wicked and Devilish Council of Jesuites, ...and other like Persons, dangerous to the Church and State; are so far perverted in point of their Loyalty, and due Allegiance unto the King's Majestie, and the Crown of England, as they are ready to entertain and execute any treasonable Conspiracies and Practices, as evidently appeareth by that more Barbarous and Horrible attempt to have blown up with Gun-Powder the King, Queen, Prince, Lords and Commons, in the Parliament Assembled; tending to the utter Subversion of the whole State...*⁶⁵¹

He points out: *There is no mention of other that Popish-Recusants not one Word of Protestant Dissenter...*

Praemunire was an extreme penalty. It appears to have been used strategically, and, in the main (although not exclusively) against the leaders rather than the

⁶⁴⁹ John Selden et al, *Table Talk of John Selden* (G Routledge 1900) cited in Daniel Gosling (n638).

⁶⁵⁰ Thomas Rudyard (London 1680) Box 154.1.40 (Quaker Archive).

⁶⁵¹ The full text is in the Appendix.

majority of 'ordinary' Quakers. Obviously, the penalty would only bite against property-owning Quakers. Sir John Robinson wrote to Lord Arlington's secretary, in 1671: ⁶⁵²

They [the Quakers] are a besotted people, of two sorts, fools and knaves; of knaves some of them are rich men, and there's no other way to proceed against them but to indict them upon the Statute of Praemunire and seize their estates and imprison them during the King's pleasure. If this rule was generally followed and kept close to, it would break them without any noise or tumult.

In another example of vacillating attitudes towards Quakers, Robinson's letter contrasts with a pardon of the same year, referring to one of the two sentences of praemunire to which Margaret Fell was subjected.⁶⁵³ In 1672, the King's general pardon was specifically tailored to the offences under the Elizabethan and Jacobean legislation and was wide in scope, extending to praemunire and excommunications made under these Acts. Of course, the use of these Acts was at odds with the Declaration of Breda, which, as we saw in Chapter One, stated: *...we do declare a liberty to tender consciences, and that no man shall be disquieted...for differences of opinion in matters of religion.*

George Fox was subjected to praemunire in 1665, and 1674/5. Thomas Storey⁶⁵⁴ and Steven Pearson were local Quakers who suffered praemunire and were sentenced in 1662. Braithwaite⁶⁵⁵ cites a list that Quakers sent to the Privy Council showing around 800 cases of praemunire nationally, with a large proportion from Westmoreland.

⁶⁵² Extracts from State Papers, 337 (Cal.S.P.Dom.1672-2, 40) cited in Braithwaite (n644) 40.

⁶⁵³ Mary Anne Everett Green and Others, Calendar of State Papers, Domestic, Charles II (London: Longman, Green, Longman and Roberts 1860-1939) 4th April, 1671,171.

⁶⁵⁴ Storey was a determined Quakers who challenged the emergent central leadership.

⁶⁵⁵ William C Braithwaite (n644) 100.

Legal Advice

Introduction

The Conventicles Act 1670, the increased use of praemunire and the application of the 'Acts against Popish Recusants' appear to have been the catalyst for the centralised Quaker organisation's decision to seek legal advice from the mid-1670s.⁶⁵⁶ By this time, Fox himself was amenable to legal representation, contrary to his earlier position when he had insulted '*lawyers as black as puddles...*' Thomas Corbett represented him in court when he was under threat of praemunire in 1674/5.

The seriousness and precision of the Quakers' questions in the Book of Cases contrasts with the style of some of their tracts in which they blur legal exactitude with polemic. Their questions to counsel, which ranged from generic to specific, indicate not only their own but also their lawyers' general unfamiliarity with this penalty and its attendant procedures. This tends to support the argument that praemunire had been little used for day-to-day legal proceedings and that its application towards Quakers was opportunistic and vindictive.

As we saw in relation to the Conventicles Acts,⁶⁵⁷ some themes emerge.

Imprisonment

This was a burning issue. Praemunired Quakers could be imprisoned indefinitely. For example, Thomas Storey and Steven Pearson from Cumberland, were imprisoned for over seven years.

Thomas Corbett's written opinion,⁶⁵⁸

Q. Whether it be not illegal to imprison upon the refusing to take the oath of allegiance? ⁶⁵⁹

A. Notwithstanding the general opinion and practice ... I conceive it is not warranted by any law or statute; ...3 Jas.c.4, which enjoins the taking of that

⁶⁵⁶ Book of Cases, YM/MfS/BOC1 (Quaker Archive) 119-120.

⁶⁵⁷ Chapter Four.

⁶⁵⁸ Alfred W Braithwaite (n640) 37-43.

⁶⁵⁹ Book of Cases (n656) 16 and 17.

oath, states that the parties refusing shall incur the ...penalties mentioned in the Statute of Praemunire.... "To be put out of the King's protection, their lands and tenements goods and chattels forfeited to the King, and to be attached by their bodies and brought before the King and his Council to answer a process of Praemunire facias to issue against them to bring them in to answer the contempt." Note that it hath not such words as the former Statute of Praemunire made 27 Ed.3rd Stat.1.c.1. which says of their bodies "shall be imprisoned and ransomed at the king's will.

He goes on to cite his own submission, on George Fox's behalf, to this effect at Worcester, but notes that it was not determined because other procedural errors took precedence (at his request.)

Braithwaite⁶⁶⁰ thinks that his submission would not have been accepted because Corbett failed to mention the concluding words of the Richard II Act:

or that process be made against them by praemunire facias, in manner as it is ordained in other statutes of provisors and other which sue in any other court in derogation of the regality of our lord the king

which, Braithwaite says, appears to import into the Richard II Act the Edward III statute and 'so make the penalties laid down in the statute also, part of the praemunire penalties incurred...This must have been what Coke thought,' citing Cokes Institutes which included *imprisonment at the King's pleasure as a penalty for praemunire.*

This was also the view of the leading lawyer, Henry Polloxfen⁶⁶¹ who advised Quakers on praemunire.

Procedure

Polloxfen was asked to advise on procedure for a specific case involving four named Quakers.

⁶⁶⁰ Alfred W Braithwaite (n640).

⁶⁶¹ A member of the Inner Temple, a politician and, later, a judge.

It should be noted, in the context of the questions, that section X of 3 Jac c.4 specifically provided that indictments for recusancy could not be avoided for want of form.

Quakers summarised the mittimus: ⁶⁶²

In York General Sessions convicted for refusing Oath of Allegiance lawfully tendered to them in contempt of laws of the nation. Committed at the same sessions goalers to receive their bodies into custody and keep them safely until delivered by due course of the law.

The Quaker's question centred on the facts that:

Names not included nor in the justices warrant for committal without showing said oath was first tendered to them before they were indicted for their first refusal, also without showing the first tender of the said oath was either acc to 3 Jac c 4 by 2 JPs out of sessions or acc to 7 Jac c 6 by 1 JP out of sessions ...

Q. If lawful for the Justices ... To tender such oath the 2nd time at such assizes being not 1st tendered out of assize or sessions whether to convict of a praemunire

A. Upon 3 Jac 4 the words (or any person whatsoever) the refusal in the court of assizes or sessions being there tendered, though never tendered or refused before, incurs the penalty of praemunire for which they may in the same assize or quarter sessions indict and convict.

Q. If justifiable in Clerk of Assize or process to deny a copy of the Indictment before or after conviction for the offence or is it lawful for a Judge of Assize or process to deny his warrant for the Clerk whereby the person convicted may yet have the benefit of bringing a writ of error (in a case so very penal)

A. I conceive the denial of a copy, especially after conviction to the person convicted, to be against the law.

Counsel Rokeby's and Pricketts' opinion was obtained on factual and procedural aspects of a case involving Henry Jackson.⁶⁶³

⁶⁶² Joshua Green, Mark Burdett of Denby, Thomas Sparold of Bawtry and William Hill of Thorne.

Forfeiture and Avoidance

Jos. Tily, of Lincoln's Inn on 2nd March 1682, ventures an answer to a very important question which must have emanated from actual experience:

Q. Whether lyable in a praemunire case for forfeiture from the time of the indictment preferred or only from the time of conviction.

A. This point hath been very much controverted and seems underdetermined to this day. But I do conceive that the forfeiture in praemunire shall relate only to the time of judgement...

Polloxfen advised

Q. Whether the offender may not before seizure made of his effects into the King's hands, make a good and lawful sale, both of his personal and real estate, orr either, for the satisfaction of his...debts, owing to his supportive creditors, or in consideration of ready money...

*A. He cannot after the offence and conviction.*⁶⁶⁴

Tily also advised⁶⁶⁵ regarding an indictment of: Henry Engleby, labourer; Thomas Mornington, labourer; Thomas Freeman; John Edmonby; others and their wives, at Gloucester for refusing the oath of allegiance:

Ref praemunire: by 7 Jac. the oath must first be tendered out of court before a JP and again at the sessions and refusal both times ...shall incur Praemunire.

Q. What kind of process of penalty issues forth against persons and ...of such as by conviction of a person for refusing the oath upon lawful tender?

A. The JP by the stat of 3 Jac. are to commit the person to the common jail, there to remain without bail or mainprize till they take the oath... this is the utmost penalty against such of the defendants in the indictment as are married women... But this being a penal law it cannot be extended about the express words of the statute in equity and therefore this Act extends not to the forfeiture of Annuity, land charges, ...fairs, markets, warrens or other

⁶⁶³ Book of Cases (n656) 159-160.

⁶⁶⁴ Craig Horle, *Quakers and the English Legal System, 1660-1685* (University of Pennsylvania Press 1988) 212 says that Polloxfen was in error in his advice on praemunire; he is not clear why.

⁶⁶⁵ Book of Cases (n656) 127.

hereditaments that cannot legally pass in grants by the word and neither doth an Attainder in praemunire work any corruption of blood.

(In other words, the penalty is specific to the individual and does not pass to family members).

If the persons are not in custody at the time of the conviction ... after judgement, in nature of an execution and process upon conviction issues to seize their lands etc into the King's hands as is usual in cases of treason and felony... Sometimes a confession is directed to particular persons, such as the Attorney General doth appoint. But I take it the most usual method is by inquest of office (which I think issues out of the petty Bagg?) to the escheator or the Sherrif.

The gravity of praemunire is shown by its equivalence with treason and felony in the body of this advice. The advice also makes clear the differentiation between criminal and civil law in the limitation of interpretation of the statute. This begs the question as to how the whole statute, if it is treated as a criminal matter, could be extended to apply to Quakers. This point is taken up by Rudyard because they were being convicted purely on repeated refusal of an oath and without a criminal trial.

4. The 'Acts Against Popish Recusants'

This section does not concern oaths but follows logically from the previous section in that both praemunire and the proceedings under these Acts derived from the same Elizabethan and Jacobean legislation cited above. These Acts were collectively called the Acts against Popish Recusants. They contained severe penalties and, when used against dissenters during the later stages of Charles II's reign, were sources of serious complaint, petitions and treatises.

In order to enforce conformity with the Anglican Church and prevent Catholic dissent, the Acts included a series of penalties for sundry offences such as not attending church. Quakers refused to do that. In the 1650s non-attendance at church was tolerated and this legislation was not employed. However, this indulgence ceased during the Restoration. The worst period followed the 1676

Order in Council which directed the use of these Acts when anti-dissent was at its height and in the aftermath of the Titus Oates and Rye House plots.

Of the penalties, which included stringent fines, for Quakers, imprisonment was a common outcome. This illustrates the fact that there was duplication in the law relating to attending church in that both ecclesiastical and secular law prescribed it. The court in which proceedings were held is unspecified in the majority of cases but a batch of around sixteen cases in 1679 was heard in quarter sessions which were not ecclesiastical courts. These courts determined cases under the Conventicles Acts. These particular cases resulted in imprisonment, which was not an ecclesiastical penalty. Such matters thus ran concurrently with separate secular proceedings since the legislation added to the existing legal morass by Charles II's government and provided a more definite secular focus against conventicles, as discussed in Chapter Three. Quakers, and others in similar principled opposition to attending church, were thereby in danger of prosecution in both courts. The question of duplication was an issue that was taken up by Quakers and there was provision under secular procedure to avoid this as detailed below.

The requirement for churchwardens to report non-attendance at church was a duty inherent in their role under ecclesiastical law but these secular statutes also placed a statutory requirement upon them. It is clear that, on the secular side, but on less secure legal grounds, informers reported Quakers too.

Legal Advice

Introduction

Quaker queries⁶⁶⁶ demonstrate how the use of these Acts conflated the Restoration issues of religious uniformity and seditious conventicles, with the state's long-standing concerns about disloyal Catholics.

The themes of their questions were as follows:

⁶⁶⁶ Book of Cases (n656) 53.

Conformity

Quakers were concerned, in a rather nit-picking way, about the interpretation of the law concerning conformity and the Book of Common Prayer.

Q. Seeing as the aforesaid statute 23 Eliz cap1 touching the penalty of £20 a month for forbearing to go to church is related to a conformity only unto the stat 1 Eliz c 2 And the said 1 Eliz c 2 related to a uniformity and conformity for the booke of common praier and thereby then established and to no other and that since (that is to say) by the aforesaid Statute 14 Car c 2 another booke of common prayer is prescribed and established and thereby also conformity is required for the said new book and to no other.

A. This accords with the recital of the 1664 Act.

Q. Whether or not therefore the said last mentioned Statute made for uniformity only to the said new booke is not contrary in matter or forme or otherwise oppates? So in law as to take away or put out of use the ould coman prayer Booke established by the first abovementioned statute made under 1 Eliz c 2 and consequently, in relation to the said old booke of common prayer and going to church and conformity thereunto abrogates or abolishes the same statute.

A. Although the statute of 14 Car 2 doth alter the common prayer booke in severall particulars yet it doth not repeal any part of the former statutes because there is a particular proviso made, that the former acts shall stand and bee applied to this new Booke and no other.

Corbett expanded:

The old statutes of 1 Eliz 6 c.1; 1 Eliz c.2 and 23 Eliz c.1 are all for uniformity as well as the now act of 14 Car 2 and there is not mentioned in them of conformity but if they had been so as is supposed that would not alter the case for that uniformity and conformity signifie the same thing the one being an uniting in form and the other an agreeing together in forme.

Informers

Questions about information identifying them, and of the role of informers arose again:⁶⁶⁷

Q. Whether or not an Information ... lyeth by a common informer before the JP in their quarter sessions upon the aforesaid Stat 23 Eliz 1 for ... the penalty of £20 per month for neglecting to go to church or is such an Information or action for the same to be brought only in one of the Courts of Westminster...?

A. ...an action or information by a common informer ...Lyes not before the JP in their quarter sessions by any of the said statutes for Recovery of the £20 monthly forfeiture for not coming to Church.

Q. If so, has 28 Jac. C. 4 or any other statute enlarged the jurisdiction of Quarter Sessions for such an informer or must he still bring his information or action for the same in the Westminster courts?

A. No statute has enlarged the jurisdiction of the JPs as to such informations, but by 23 Eliz c 1 the JP in quarter sessions may take indictments for not coming to Church every Lords day or once a month...⁶⁶⁸

Q. If he may bring his said information ...in the quarter sessions whether the defendant may not plead the general issue and give special matter in evidence according to 21 Jac c 4 notwithstanding the stat 2 Jac c 4 which admits no other the direction ...to the point of not coming to church: but if such information lyeth not in the quarter sessions what course may be taken most effectual to stop or avoid such proceedings ...

A. In what course ... the action or information is brought upon the said Stat by the informer the defendant may plead the general issue:⁶⁶⁹ but he shall not thereupon give any special matter in evidence but such as doth directly maintain the offence and not any collateral matter.

⁶⁶⁷ as in the case of conventicles, as discussed in Chapter Four.

⁶⁶⁸ Horle (n664) queries Corbett's advice as being inaccurate or too favourable to Quakers on occasion.

⁶⁶⁹ The 'general issue' concerned the nature of evidence to be adduced.

Fines

Quakers sought clarity over how the severe financial penalties, such as £20 per month for failing to attend church were assessed.

A. only re the month in the information and not for any month after such conviction.

Outlawry

Q. Whether or not quarter sessions may proceed to outlawry upon a popular action or information in the same court or must they certify the cause to one of the courts at Westminster ...

A. They may not proceed to outlawry upon popular actions or informations but upon Indictment for the severall offences, they may ... return those outlawrys into the Exchequer, but by 29 Eliz c 9 and 3 Jac c 4 there is a speedier way of conviction for not coming to church.

Strategic Advice

6th November 1676 counsel's advice⁶⁷⁰ concerning seizures of land for not coming to church

- 1. Where the Inquisitions are not yet taken up they who have any mortgages or reall Incumbrances upon their estates should produce upon the executing of the Inquisition and have some Counsell or Attorney to prove them ... so the Jury may clearly see that the person convicted is not seized of any lands.*
- 2. Where no Incumbrances is to be produced have Counsell ...be present to observe what evidence the jury hath to find the partie seized for the jury who are on oath ...cannot justly find a man seized upon common fame or the proposit of the Country barely ...*
- 3. Lett care also be taken to satisfie the Jury that the partie convict is no popish recusant and if it be possible to get the jury to put that into their Answer.*
- 4. If the Inquisition be taken then there is no remedy but either first to plead some incumbrance if there be any –here above in the Exchequer or secondly*

⁶⁷⁰ Book of Cases (n656) (concerning Thomas Langhorne).

to petition the King setting forth that they are no popish recusants and praying thereupon his Majesties directions in the Law and a pardon under the Seale.

Send Coppies of this to the adjacent Counties ...and be sure that all friends concerned doo constantly attend at the assizes without accepting a summons.

Obsolete Legislation

Questions arose again⁶⁷¹ as to whether 35 Eliz c.1 was still in force. It was a more potent Act in relation to attending church than in relation to meetings. As well as the fact that Acts were not commonly published and lawyers would not always know which remained in force, some of the Elizabethan and Jacobean Acts against not going to church were repealed by acts or ordinances of the Interregnum.⁶⁷²

Q. whether 35 Eliz c 1 ... punishment of persons obstinately refusing to come to church is now in force and if it is when was the same made perpetual.

A. 35 Eliz 1 is long since expired for that it was to continue but to the end of the next sessions of Parliament... this act ...the tittle thereof being quite different viz punishment of persons obstinately refusing to come to church and persuading others to impinge the queens authority in ecclesiastical causes, so that by reason of this mistake in the tittle it is not continuous by any subsequent act; there being no act made in the 35 year of Eliz with any such tittle as is recited in all the continuing acts which are 6 in number made in the reign of Q Eliz King James and King Chas 1....

The essential point was whether these statutes could concern Quakers.

Q. Whether it be not Illegal to returne persons called Quakers who have been eminently known to be such many years as Popish Recusants.

A. ... it will be very harsh that such as are called Quakers should for their not coming to Church be returned as Popish Recusants for though the penalty of

⁶⁷¹ as with conventicles, see Chapter Three.

⁶⁷² Subject to whether the acts and ordinances were valid in the first place. See *Acts and Ordinances of the Interregnum, 1642-1660*, ed CH Firth and R S Rait (London 1911) Introduction, British History Online (accessed 19 August 2016).

£1 for every Lord's Day or absence from Church imposed by the Statute of 1 Eliz c.2 may... protestants as well as papists yet the penalty of £20 for every month's absence from Church imposed by the statute of 23 Eliz c.1 was never intended as certain to extend to Protestants as appears by the preamble of the act and by a proviso therein and also by the Statute of 3 Jac c.4

Note the strategic advice: *And if any called Quakers be so returned among Papists it will be their best way to take copies of the returnes and to move the Court thereupon.*

Taken as a whole, the tenor of the questions and the ensuing advice indicates that they had encountered unexpected legal problems with more severe consequences than might have been expected. Church attendance may have had a function in fostering loyalty and legal compliance but not attending church or participating in the Sacraments had been tolerated in the Interregnum and, by itself, hardly constituted a direct threat to state security.

Tam Quam⁶⁷³

In 1683, a powerfully argued dissenting tract, *Tam Quam: or an Attaint* was addressed:

*Against those Modern Jurors who have found any Indictments upon the Statutes of 23 Eliz, 29 Eliz or 3 Jacobi against Protestants, for monthly absence from Church, without any Confession of the Parties, or Oath of Witness against them, or made any Presentment of them. Contrary to the express Letter of their Oaths taken in a Court of Judgement, the course of the Law in England, or any right Reason.*⁶⁷⁴

⁶⁷³ Anon, *TAM QUAM: OR AN ATTAINT Brought in the Supream Court of the King of Kings; upon the Statutes Exod 20 7 16 and Levit 19 12* (London 1683) (Dr Williams Library, Tracts 1641-1700). The fact that this tract is held in Dr Williams Dissenting Library shows that use of this legislation was having a deleterious effect on all dissenters.

In a '*digression*' from his theme concerning grand-juries, evidence and oaths,⁶⁷⁵ the author refers to the contemporary questions concerning the said statutes: whether they were in force and, if so, the moot question of whether they applied to Protestant dissenters which he says has not been determined judicially and should not be left to *puny lawyers* and JPs.

He acknowledges three common arguments that are accepted by lawyers:

- i. several references to *every Person*, and *Recusants* unqualified by the term *Popish*
- ii. 1 Eliz 2 includes Protestants
- iii. the oath of allegiance in 3 Jac c.4 may be given to anyone.

He argues that these points cannot be conclusive. Firstly, and consistently with Rudyard, the preamble *hath declared the Reasons and Grounds for the making of that law*. Secondly, with particular reference to the Act for Keeping the Sabbath as compared to a provision in the Conventicles Act *latter laws abrogate such as were before, if contrary to them*. Thirdly, inconsistencies in the application of laws *general words in statutes, shall comprehend dissenting Protestants where they will serve to do them mischief, but not where they may do them kindness*.

*...it doth appear 1. That threescore Years after the making of the Act 23 Eliz. it was never put into Execution upon any but known and professed Popish Recusants, it is certain a greater Argument to prove that Protestants are not within it in any due Constructions, than any can prove they are.*⁶⁷⁶

He argues Protestant dissenters are in a worse position than Catholics because they do not go to church and may be forced to abjure realm or die like felons, which could not have been the Elizabethan parliament's intention.

He also cites the House of Commons declaration:

... I do very well know that Votes of Parliament repeal no Laws, much less have the force of Laws in them, nor are to be mentioned in legal Pleas: but the

⁶⁷⁵ As discussed in Chapter Five.

⁶⁷⁶ Tam Quam (n673) Chapter III.

Question here is not, whether these Acts be of force or no? It is on all hands granted that they are; but what is the true sense and meaning of them?

He proceeds to recite the progress of parliament's consideration *upon the Petition of the Quakers*.⁶⁷⁷ A committee regarding the use of these Acts against Protestants began in 1677. In the middle of 1678, parliament became diverted by the *horrid Popish Plot*.⁶⁷⁸ It was prorogued on 30th December and then dissolved. The next parliaments between 6th March 1678 and 27th May 1679, and then 21st October 1679 and 10th January 1680, were still engaged with the plot but there were express instructions from the commissioners of the Treasury to levy forfeitures only against known popish recusants. Tam Quam continued:

By this time the Popish Party had a little recovered their Courage, and began to defame the very Report of a 'Popish Plot'. They had eight months before begun to sham it, though with ill success: but before this time they had began to divert the prosecution of it, by obtaining of their Friends (who would be thought Protestants) every where to prosecute Dissenters upon those Statutes. The Parliament that sat down October 21 1680 had intelligence of it.

Recusancy Rolls

Introduction

Under the Acts against Popish Recusants, Quakers became liable to be entered on the Rolls of Recusants. Recusancy records predominantly concerned popish recusants until the 1670s and the inclusion of Quakers in those returns was later halted. The use of the law in such cases to specifically identify, record and penalise Quakers, is connected to political developments at their respective times.

⁶⁷⁷ The petition was as follows:

Petition to Chief Justices of England and all King's Judges on Circuit to show direction and that Quakers should not suffer on laws made v Popish recusants... prey to wicked informers and merciless men...we intreat you...Quakers can be distinguished ...further levy of the profits of their estates seized into the king's hands by Exchequer process as by the Lord Treasurers warrants may appear.....Signed by us on behalf of our suffering friends in scorn called Quakers: Thos. Rudyard, Wm. Shown, Saml. Groom, Zachary, Osgood, Wm. Gibson, Vaughan, Wm. Meade.

⁶⁷⁸ He was referring to the Titus Oates plot.

Horle states⁶⁷⁹ that at the conclusion of quarter sessions or assizes, indicted recusants were proclaimed and enjoined to appear at the next sessions or assizes. Friends were often unaware they had been proclaimed or whether their fines had been returned to the Exchequer, hence the advice below from a meeting of sufferings. In referring to the infrequency of recusancy prosecutions (except in the 1680s) Horle suggests that Quakers were not unduly concerned with the Recusancy Acts: ⁶⁸⁰ 'it is likely that Friends regarded recusancy presentments and convictions in the same way they regarded excommunications, that is, not worthy to record unless they resulted in distraint, sequestration or imprisonments.' This accords with my view to the extent that Besse's records neither show everything, nor can be solely relied upon as the basis of analysis. However, it does not accord with the findings of the significant scale and effect on Quakers as shown in the number of their names in the Recusancy rolls or with the need to obtain legal advice and the vehemence of Rudyard's petition to King and parliament.

A Letter to Friends in all Countyes, London 27th April 1678, from Meeting for Sufferings:⁶⁸¹

Advising care be taken that a list of all friends in prison be laid before the Judges when they come on their circuits especially their first time, especially where the gaollers do not put them in their calendars or do ... them in prison only to get money or Chamber rent. Of any desire the Judges to call for them to know the causes of their detention in prison in order to afford them what they can.

And dear friends after much endeavours with the Parliament for a stop to be put to the persecutions upon those Laws made against Recusants ... we understand there is not like to be a redress this session tho the case was yesterday moved in the House of Commons ... you are desired to send exact

⁶⁷⁹ Horle (n664) 143.

⁶⁸⁰ Horle (n664) 269.

⁶⁸¹ Book of Cases (n656) 41.

*accounts of further sufferings and Levyes ... to present to King or Parliament.
Ditto proceedings re recusancy agst. Friends.*

As a solution, Rudyard proposed a declaration that denounced loyalty to the Pope and *transubstantiation and distinguished between Protestants and Papists*. Whether Quakers and other dissenters should be allowed to make such a declaration was the subject of debate. The Rawlinson MSS catalogue contains a list of draft acts considered by House of Lords, one of which distinguished between Protestant dissidents and popish recusants.

For a short period, this was permitted. The following is a local declaration of Quakers,⁶⁸² whose names were entered in the Recusancy rolls.

Testimony against Transubstantiation, 1681

There are two similar *Declarations of sundry persons as to their faith*, made on 8th October 1681.

Solemnly and sincerely in the presence of God profess testifie and declare that doo believe that in the Sacrament of the Lords supper there is not any transubstantiation of Elements of bread and wyne into the body and blood of Christ at or after Consecration thereof by any person whatsoever...

The wording of the Declaration addressed the still live issue of Catholic equivocation regarding oaths:

And we doo solemnly in the presence of God profess testifie and declare that we doo make this declaracord and every part thereof in the plaine and ordinary sense of the words read unto us. And they are commonly understood by English Protestants without any ... equivocation or mentall reservation whatsoever, and without any dispensation already granted to any of us for this purpose by the Pope or any other authority or person whatsoever or without any hope of any such dispensation... and without thinking that wee are or can be acquitted before God or man or absolved of

⁶⁸² Swarthmore Monthly Meeting. Matters of Faith 1681-1730, BDFC/F/120 (Cumbria Archive, Barrow-in-Furness).

this declaration or any part thereof, although if the Pope or any other person or ...power whatsoever should dispense with or ...declare that it was null or voyd from the beginning .

This testimony was given before the Chief Baron of the Exchequer at Westminster and voluntarily repeated before Westmoreland JPs in public and then subscribed.

5. Cases in the North West

Besse cites the proceedings that were brought under these Acts in various ways. In the North West, around fifteen convictions for 'absence from national worship' were each brought in 1664 and 1676. In 1679, sixteen Quakers were imprisoned for absence from national worship. Three further cases under this head were brought by JP John Aglionby in 1681, about fifty in 1684 and two in 1685. Besse records two further cases for 'not attending church' and not receiving the sacrament respectively. The Mayor of Kendal, John Beck, brought three cases for 'non-conformity' which led to imprisonment, as did many others. Ninety-six cases were brought 'under 23 and 28 Eliz I' between 1677-1678. The names of these prisoners were presented to parliament on 1st April 1678. All of these were pursued in the Exchequer. Consequently, Quakers had to travel or be found guilty in their absence. Elsewhere, Besse refers to the 'Acts against Popish Recusants' of which one was brought in 1678 and there were one hundred and fifty in 1684. Twenty-five cases in 1685 are recorded as assize cases. Thus, towards the end of Charles reign, when anti-dissent was at its most virulent, proceedings under these Acts reached their height. At this point parliament had been dissolved.

These local cases indicate that this was a highly politicised action against dissent, evidence for which is seen by the coincidence of spikes in proceedings with the political events of the late 1670s and 1680s.

6. Conclusion

Critical analysis of the above legislation indicates that the use of the Statute of Praemunire that was described in Section 2, and the Elizabethan and Stuart legislation designed for Catholics, against Quakers was, at best, a dubious extension of their scope, and at worst, deliberate persecution. This is evidenced by the fact that these old Acts were redeployed in periods of intense controversy over dissent. This is contrary to the arguments propounded in relation to conventicles⁶⁸³ and tithes⁶⁸⁴ that there were legitimate concerns concerning Quakers' behaviour.

Although, as the author of *Tam Quam* admits, non-conformity was within the scope of the Acts in question, their purpose was to curtail allegiance to Rome amongst Catholics. Of course, as was indicated in Chapter Two, the Church of England, anxious to re-consolidate itself, was perfectly happy to lend its weight and deploy its churchwardens in pursuit of non-conformists of whatever persuasion.

Abuse of the law and the stretching of earlier statutes to apply to Protestant dissenters was periodically acknowledged by Charles II and his advisors but, as we saw from the account in *Tam Quam*, a permanent solution was thwarted by politics until the Toleration Act. In this instance, Quakers' persistence, both by petitioning, such as Thomas Rudyard's, and their absenteeism from church, which was recorded in the Recusancy Rolls, exemplifies their purpose in recording sufferings to highlight the law's deficiencies relating to religious dissent.

⁶⁸³Chapter Three.

⁶⁸⁴Chapter Seven.

Chapter Seven

TITHE LAW ⁶⁸⁵

1. General Introduction

In Chapter Two we saw how the restored ecclesiastical courts resumed business in the North West. Tithes occupied them early on and featured predominantly amongst the ecclesiastical offences for which Quakers were brought before those courts. Tithes were of enormous economic, social and political importance to mid-seventeenth century society. ⁶⁸⁶

This chapter focuses upon tithe law and the challenges and responses to these challenges, that Quakers brought to their recovery. The records of sufferings⁶⁸⁷ abound with references to tithe penalties. By the time of the Restoration, there was a large body of secular and ecclesiastical law relating to tithes. It is important to understand the specifics of the law in order to appreciate how and why these sufferings occurred.

The second part of this chapter describes tithe law and the legal framework surrounding tithe classification. Thirdly, the legal apparatus by which tithe disputes were determined is examined. This includes a discussion of both secular and ecclesiastical jurisdictions in relation to tithes.

The fourth part looks at criticism of tithes which helps to inform as to why Quakers withheld them. As we saw with oaths,⁶⁸⁸ contemporary criticism was not confined to Quakers. The abolition of tithes featured in the manifestos of such groups as Levellers and Diggers in the Interregnum, and, for a time, found

⁶⁸⁵ I have been immensely assisted by Professor Andrew Lewis with regard to tithe law.

⁶⁸⁶ And throughout their history. As such, this is a topic of legal history that has been unjustifiably overlooked, although there is beginning to be a resurgence of academic interest in tithes generally, as, for instance the Conference at the University of Kent, June 2017.

⁶⁸⁷ And not only those contained in Besse. Tithes predominate in The Great Book of Sufferings and in local individual Meeting records.

⁶⁸⁸ Chapter Five.

favour with Cromwell. However, as we also saw in relation to oaths, Quakers maintained their opposition by direct action upon the Restoration. In Section 5, this chapter therefore critically examines the deliberate choice of the Quaker movement to withhold them and to insist upon refusal to pay as a term of commitment to membership of the nascent Society of Friends. So far as local instances of legal proceedings against Quakers are concerned, a local tithe controversy is discussed in Section 6 and Section 7 provides examples of cases involving Quakers in the North West.

2. The Development of English Tithe Law

Introduction

In order to understand the legal framework surrounding tithes in the mid-seventeenth century, it is necessary to consider how English law regarding tithes had developed. This is summarised⁶⁸⁹ as follows.

The appropriation of ten per cent of a community's produce by way of tithe to support the priesthood pre-dated Christianity. The Old Testament authorities were Leviticus 27:30; Numbers 18:20-28; Deuteronomy 14:28-29, 26:12 and 14:22; Nehemiah 10:37-38; and in the New Testament: Matthew 23:23. A range of essentially voluntary offerings was made to the church from the early years of Christianity. There was, at that time, no clear obligation to pay a set amount or proportion of produce. Professor Lewis also points out,⁶⁹⁰ that there is no distinct continuity between the Judaic system of tithe and the early Christian practice of voluntary donation.

⁶⁸⁹ For a detailed exposition, see RH Helmholz, 'Tithes and Spiritual Dues' [2004] *The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford Scholarship Online doi:10.1093/acprof:oso/9780198258971.003.0004). For a contemporary 17th century account, J. Selden, *The History of Tithes That is the Practice of Payment of Them, the Positive Laws Made for Them, The Opinions Touching the Right of Them: A Review of it also annex which both confirms it and Directs the Use of it*. (1618. Early English Books Online) and for a clerical perspective, Simon Degge, *The Parson's Counsellor, with the law of Tythes* (London 1676); J Godolphin, *Reportorium canonicum, or, An Abridgement of the ecclesiastical laws of this realm* (London 1678) 344- 464.

⁶⁹⁰ Andrew Lewis, 'When is a Tax not a Tax but a Tithe?' in John Tiley (Ed.) *Studies in the History of Tax Law, Vol. 2* (Hart Publishing 2007).

In England, around 794, King Offa⁶⁹¹ gave the church the tithe within Mercia, with a civil right to recover it by way of property and inheritance. This was extended throughout the country in the following centuries. From then, legislation supported the church's collection and entitlement to tithes as a tenth of the increase in the produce of the land, and, by 11 Edgar c.3, through the imposition of severe penalties for non-payment.

Meanwhile, canon lawyers developed exquisitely detailed rules surrounding the classification of tithes and the doctrine of divine entitlement for clerics entitlements to receive them. By at least the twelfth century, all Christians living in a parish were obliged to pay one tenth of their income from all sources to the parish priest.⁶⁹² In the thirteenth century, Thomas Aquinas⁶⁹³ asserted that, the obligation to pay tithes arose from the natural law, not biblical authority.

A swathe of legislation was brought in after the Reformation, particularly by Henry VIII and Edward VI,⁶⁹⁴ presumably to provide a legal basis for the newly reformulated Church of England's right to tithes. This legislation also dealt with the outcome, so far as tithe entitlement was concerned, of the dissolution of the monasteries which had been large-scale tithe holders.⁶⁹⁵ Improprated monastic tithes first went to the King, and then to laymen or corporate bodies to whom monastic lands were granted. The Payment of Tithes and Offerings Act 1540⁶⁹⁶ s.1 provided that such laymen could sue for tithes in their own right and many claimed these in perpetuity as had the monks. Hill shows that improprated tithes were an important aspect of revenue 'leasing of tithes or purchase of an impropriation offered a convenient, safe and not unprofitable form of investment.'⁶⁹⁷

⁶⁹¹ Apparently, by way of atonement, according to Burn, citing Prideaux on Tithes 165: Richard Burn, *Ecclesiastical Law* (H Woodfall and W Strachan 1763)374.

⁶⁹² Lewis (n690) 2.

⁶⁹³ Thomas Aquinas, *Summa theological*, 11.2.q.1xxxviiia, cited by Lewis (n690).

⁶⁹⁴ 5 Hen IV, c.11 1404; 27 Hen VIII c.20 1536; 32 Hen VIII c.7; 2 & 3 Edw VI c.13 1549.

⁶⁹⁵ There were detailed provisions concerning the former monastery tithes. These are not set out here but may be found in Burn (n691) 381-392.

⁶⁹⁶ 32 Hen VIII c.7.

⁶⁹⁷ Christopher Hill, *Economic Problems of the Church: From Archbishop Whitgift to the Long Parliament* (Oxford University Press 1968) 117.

Helmholz found that there was an increase in tithe litigation after this period.⁶⁹⁸ Tithes were granted to laymen known as lay impropriators or lay rectors. It was their duty to retain a vicar to serve the parish. Corporate lay impropriators, such as the universities and Whitehall, depended upon tithes as part of their income. The Payment of Tithes and Offerings Act 1540 enabled them to utilise the positive law of the church to enforce their rights.

Helmholz says 'Classical canon law regarded payment of tithes as an expression of the duty all owed to God and God's representatives on earth, the clergy.'⁶⁹⁹ However, in the light of lay impropriators' entitlement, the canon law concept of tithes as an expression of divine duty wanes as against tithes representing a 'tax'⁷⁰⁰ as a positive law of the church.

The Nature and Classification of Tithe⁷⁰¹

There were three main categories of Tithe.

1. Praedial tithe which arose 'merely and immediately from the ground'⁷⁰² such as, grain, hay, wood, fruits and herbs.
2. Mixt tithe arose from things immediately nourished from the ground, such as colts, calves, lamb, chickens, milk, cheese, eggs.⁷⁰³
3. Personal tithes comprised profits from labour in *personal work, artifice or negotiation*⁷⁰⁴ and were assessed as *the tenth part of pure gain after charges deducted*.⁷⁰⁵

There was no reduction for expenses of producing praedial tithe whereas there was for personal ones. Helmholz says that canon law tended towards reducing the scope of personal tithe and expanding that of praedial tithe. There were

⁶⁹⁸ Helmholz (n689) 9.

⁶⁹⁹ Helmholz (n689) 3.

⁷⁰⁰ For a discussion on whether they constituted a tax or not, see Lewis (n690).

⁷⁰¹ The primary source used for this section is Burn (n691) Tithes 373-419, Burn cites canon lawyers as authority for determining the law.

⁷⁰² Burn (n691)375 citing Watson c49.

⁷⁰³ Watson c49, cited in Burn (n691)375.

⁷⁰⁴ Watson c49, cited in Burn (n691)375.

⁷⁰⁵ Watson c49 cited in Burn (n691) 375.

difficulties in proving that an individual had made a profit from personal tithes. Legislation clarified certain such obligations.⁷⁰⁶

In general, tithe was 'paid for such things only as do yield a yearly increase by the act of god.'⁷⁰⁷ There were exceptions, such as for saffron, which was gathered three yearly.⁷⁰⁸ However, *if seeds be sown on the same ground, and renew oftner than once in the year, the tithes thereof shall be paid so often as they do renew...as in the case of clover...*⁷⁰⁹

Great and Small Tithes

It is important to appreciate the distinction between great and small tithes when studying documents relating to them because, whilst the term may have been familiar when the documents were written, readers in a post-tithe era may err by misunderstanding the references to great and small tithes as references to size or quantity. Records of Quakers' sufferings often refer to a high figure for the tithe or fine being determined for a small tithe which can be misinterpreted as being a disproportionate sum in relation to the value or size of the tithes. One of many such instances in Besse is as follows:

*ANNO 1672. John Smallshaw, for small Tithes of but 6s Value, was sent to Prison, where he lay near two Years, and for the same Tithe had a Mare taken from him worth 40s.*⁷¹⁰

Such sufferings appear cruel and arbitrary. In fact, the terms refer to the classification of certain tithes and to whom they were paid.

Chief grains, such as corn, hay and wool were treated as great tithes.⁷¹¹ Other praedial, mixt and personal tithes were treated as small tithes.⁷¹² Tithes of clover

⁷⁰⁶ For example, 2 and 3 Edw VI c.13 ss. VII and VIII, provided that merchants and handycraftsmen (other than common day labourers) who had, or should have paid personal tithes for forty years should do so yearly, on or before Easter, on the *tenth of his clere gayness, his charges and expenses according to his estate, condition or degree to be therein abated and deducted.*

⁷⁰⁷ Wats c 46, 1 Roll's Abr 641 (cited in Burn (n691) 377).

⁷⁰⁸ Gibs 669 (cited in Burn (n691)377).

⁷⁰⁹ Burn (n691) 377.

⁷¹⁰ Joseph Besse, *A Collection of the Sufferings of the People called Quakers* (Sessions Trust 2000). 319.

grass went to the owner of the particular tithe for hay since clover is of the same species.⁷¹³ The seed of clover was a small tithe, although hay was a great tithe.⁷¹⁴

Canon lawyers held that whether a tithe fell into the greater or smaller category could be altered, by custom, quantity or change of place. In general, great tithes were payable to the rector, and small ones to the vicar. Spurr⁷¹⁵ explains the legal distinction between rectors and vicars so far as receipt of tithes was concerned. 'A rector received all revenues and tithes of the parish. Vicars had emerged from the medieval practice of monasteries 'appropriating' parish church tithes and in return they sent a 'vicarious' to perform duties. The 'vicar' received a third of the tithes and the rest went to the monastery.' There was potential for the classification of great and small tithes to cause disputes between rectors and vicars, especially when the impact of economic inflation reduced their respective values. Canon law allowed a third party with an interest in a suit to intervene in such cases, so their suits may have involved the tithe payer as well.

A vicar was inhibited from suing for tithes from a layman who denied they were due to him unless he could prove the tithes were endowed or prescribed, because all tithes were presumed to belonged to the rector.

Custom and Prescription

Local custom was a predominant feature of the categorisation, assessment, and litigation concerning tithes. There was a distinction between custom and prescription. The former related to a common right that had existed for time immemorial (that is, since 1189) within the limits of a county, hundred, town and so forth. Prescription gave a private right to a house or farm, or all those

⁷¹¹ Burn (n691) 407-412).

⁷¹² Burn *ibid.*.

⁷¹³ Watson c39 (cited in Burn (n691)416).

⁷¹⁴ *Udal v Tindal*, H 1 Car Cro 28 [cited in Burn (n691) 418].

⁷¹⁵ John Spurr, *The Restoration Church of England, 1646-1689* (Yale University Press 1991) 172.

within the estate, paying a particular amount in full satisfaction of all tithes arising on the land. A prolonged period of non-payment could discharge the tithe. In order to be valid under the law of prescription, the right had to be widespread, lengthy – over forty years – and uninterrupted.

Customs or prescriptions were originally, either *de non decimando*, that is free from payment of tithes, or *de modo decimandi*, where lands, tenements or hereditaments had been given to the parson and his successors for time immemorial in satisfaction of tithes. Satisfaction could also be by a sum of money. It could also be claimed by lords of the manor, a parish or hamlet or a private person.⁷¹⁶

Branch's case, KB 1585 Moo 219 and Bishop of Lincoln v Cooper KB 1590 Cor Eliz 216⁷¹⁷ had confirmed the canon law tenet that, ordinarily, a custom of not paying a tithe at all – *de non decimando* – was invalid. Under classical canon law, Panormitanus held that an agreement in relation to tithes that was intended to last into the future should be construed narrowly. It became the position that, unless it was confirmed by the bishop, any agreement between parson and tithe payer was confined to their lifetimes.

In general, a discharge from the requirement to pay tithes (*de non decimando*) could only be granted by the bishops and clergy, without an act of parliament,⁷¹⁸ but the monarch, by virtue of his 'mixt persona' could do so.⁷¹⁹ Certain counties were, by custom *de non decimando*, exempt from payment of particular tithes, for example, Kent and Sussex in relation to ewes' milk. Smaller areas were not so entitled except by payment in lieu. There were further refinements to such exemptions.⁷²⁰

⁷¹⁶ Burn (n691) 395.

⁷¹⁷ Cited in Helmholz (n689) footnote 104, 21.

⁷¹⁸ Gibs 674 (cited in Burn (n691) 392).

⁷¹⁹ 1 Roll's Abr 653, Deg p 2 c.16 (cited by Burn (n691) 393).

⁷²⁰ See Burn (n691) 393.

By the sixteenth century, customs – *de modo decimandi* – made under common law, were vitiated by legislation which provided that a *composition real* (namely a deed under seal) no longer constituted a valid discharge of the payment of tithes. It remained sufficient to rely on the original instrument in respect of compositions which pre-dated the legislation, but, in the event that the deed was lost, the statutes did not preserve it. The legislation thus extinguished such *modo* to the clergy's advantage.

The custom *de modo decimandi* was originally qualified by a requirement for its commencement to be reasonable and for the rate to be the full value of the tithe because it could not be presumed that the bishop would compromise to the prejudice of the church.⁷²¹

The law established various criteria for the validity of a *modus*. A tithe in kind was an inheritance certain. Such a *modus* had to be for the benefit of the parson himself, thus, a rope for the church bell would not qualify. A *modus* could not provide for one tithe to be exchanged for another. A *modus* could be held void for uncertainty, irrespective of proof of time, as in the examples of a prescription of a penny for every acre of arable land, or where the payment date was uncertain.⁷²²

A tithe owner who defended a *modus* could receive the tithe in kind or could negotiate a new (determinable) agreement as to form or rate. An instance of a highly contentious attempt to vary a *modus* is the Cartmel tithe controversy which is discussed below.

Changes in land usage, such as from arable to pasture, could also affect how tithes were determined and the continued applicability of any custom or

⁷²¹ Degge, 2 c.16 (cited in Burn(n691) 395).

⁷²² 2 P Will 572 (cited in Burn (n691) 401).

prescription. For example, there were provisions for tithe payable according to custom on parkland which had become *disparked*.⁷²³

By the seventeenth century, it was established that tithes belonged to their respective parish,⁷²⁴ although an incumbent could, by prescription, give these to another parish. The movement of animals between parishes was often commuted to money payment because of the complication of assessment. There were also inter-parochial disputes between rival tithe holders as well as in the event of uncertainty as to where the tithe was owed by the tithe payer. Tithes that were not within any particular parish, such as forests, belonged to the Crown.

Over the years, through the use of the law to determine precisely how particular tithes were to be paid, an arcane system had developed. Corn was (subject to custom) commonly tithed by the tenth sheaf which should be made by the owner of the corn. If he refused to do so, the parson could sue in the ecclesiastical courts for the specific failure to make into a sheaf. The manner of payment of praedial tithes was of such importance that it formed the basis of s I of An Act for the True Payment of Tithes 1549⁷²⁵ which provided a penalty of treble damages for failure to pay according to the custom. This penalty features in Quakers' experience as discussed in more detail below.

A custom could provide for the tenth of corn to be taken from the land nearest the church. A custom may be upheld that no tithes were payable on hay on *headland*, that is, where the horses and plough turned, provided the headland was only sufficient to turn the plough. Stubble was not tithable unless it was cut for thatch.⁷²⁶ Once the tithes were paid, no further tithe that year would be payable for pasture on the land, but if, for example, the land was planted with

⁷²³ If the original tithes were payable in money or in kind, in general, the money payment continued, notwithstanding the fact that it was no longer parkland. On the other hand, tithes of, say, a deer and herbage ceased upon disparking. Legal opinion was divided where the tithe was a division between part money and part deer.

⁷²⁴ Burn (n691) 376(citing Prideaux 302). This was known as a portion of tithes.

⁷²⁵ 2 and 3 Edw VI c13, hereinafter referred to as the 1549 Act.

⁷²⁶ 2 Infl 652, 1 Roll's Abr 640 (cited in Burn (n691) 408).

turnips, these constituted a new increase and were tithable. A prescription could allow discharge of tithes by providing fodder for milch kine, draught cattle and horses where there was insufficient meadowland to feed them. Beans and peas grown for the householder's consumption were not tithable unless they were to be sold. Grass was tithable if it was put into grass cocks, *for then the tenth may be severed from the nine parts*.⁷²⁷ In this instance, custom could provide that the parishioners simply had to measure out the tenth part of the grass and the parson should cut it and make hay. A prescription allowed an owner who made the first mowing into good and sufficient, dry, hay cocks to be discharged of tithes for the aftermowth.

Tithes were important in parochial relationships as Cummins⁷²⁸ shows. This is an important context when looking at the experience of Quakers in their opposition to tithes. The outcome could have repercussions for many others in the parish. This was especially so in relation to challenges to custom, although, as will be seen, Quakers were less concerned with the validity of particular customs than with the principle of paying tithes.

Vicars were expected to take account of the poor and show leniency, where necessary, such as in the event of bad harvest. Spurr quotes *A Representative of the State of Christianity 1674*,⁷²⁹ in relation to the common perception of a minister who extracted all tithes to the full value as *a caterpillar, a muck-worm, a very earthly minded man*. However, unfavourable customs that were applied collectively to the parish could substantially reduce the clergy's income.

Jurisdiction

Tithe cases could be heard in both secular and ecclesiastical courts.

At first instance, ecclesiastical tithe causes would normally be heard in the local archdeaconry or consistory court. Appeals in the North West went to York.

⁷²⁷ Watson 49, cited by Burn (n691).

⁷²⁸ Daniel Cummins, 'The Social Significance of Tithes in Eighteenth Century England' [2013] CXXVIII/534 *English Historical Review* 1.

⁷²⁹ Spurr (n715)15.

In the temporal courts, tithe claims were generally heard in the Exchequer, as the court of revenue and equity jurisdiction, but also in Chancery, the King's Bench and Court of Common Pleas as actions for debt. These proceedings were usually for an account; any issues of fact were referred to a jury.

Tithes were a peculiar species which did not, in this era, fall neatly into a category of a certain debt or tax and tithe law had developed around determination of a variable.⁷³⁰ Tithes had become, by now, a property right. In one sense, pursuing such tithes was a 'species of debt collection' and Helmholz notes that it is uncertain how many debt cases were founded on tithes.⁷³¹

According to Horle,⁷³² the Edwardian Act for the True Payment of Tithes 1549 did not specify in which court cases treble damages should be brought: a point taken by Quakers who challenged those brought in the ecclesiastical courts in which treble damages were pleaded.

Further, in the period under consideration, there is strong evidence of tithe cases being brought by lay tithe owners and tithe farmers at first instance in manor courts. Such jurisdiction was highly questionable and Quakers took issue over their jurisdiction as shown below.

Section XIII of the Act stipulated that suits for subtracting or withdrawing tithes should be heard before the *Kinges Judge ecclesiastical* and that it was unlawful for *the parson vicar proprietorie owner or other their fermors or deputyes* to sue before any other than an ecclesiastical judge.

However, in the Interregnum the ecclesiastical courts were not operating. Manor courts had jurisdiction in relation to debts worth under 40 shillings but, not,

⁷³⁰ Helmholz (n689) 11.

⁷³¹ Helmholz (n689) 11.

⁷³² Craig Horle, *The Quakers and the English Legal System, 1660-1685*, (1st edition, University of Pennsylvania Press 1988) 53.

hitherto, over tithes. Pearson⁷³³ recorded that, in November 1644, the clergy obtained the power to prosecute for tithes in Westminster and in petty county courts under an ordinance of parliament. This was also designed to satisfy the entitlement of ministers who had been put into livings and sequestrations following the Civil War. On 9th August 1647 *An Ordinance for the true payment of Tythes and other Duties*⁷³⁴ clarified and extended the scope of the 1644 ordinance. Significantly, these ordinances provided that the local justices of the peace could hear and determine the cases. Despite the common view that the acts and ordinances of the Interregnum were null and void at the end of the Protectorate, this practice persisted.

Further, An Act for Ministers and Payment of Tithes 1660⁷³⁵ provided:

And that all Acts and Ordinances for the due payment of Tythes are hereby revived and Continued in Force, And that this Act shall continue until the Parliament take further Order

In relation to small praedial tithes it provided that:

*...any two Justices of the Peace, dwelling in or near the Parish where cause or complaint shall arise, and not interested, shall have power, and are required, upon a complaint for detention, or non-payment, of **small** or personall Tithes, or Duties by Law due to any Vicar or Parson..., or Parsonage Farmors, or impropiators ...to give such Remedy therein and cause Execution, Sentences and Costs to be had.*

There was a right of appeal.

We have already seen in earlier chapters the relationships between local clergy and JPs. Their close association regarding tithes is shown here but it should, again, be noted that this legislation made the JPs' jurisdiction mandatory. The sources quoted below show how this could be unfavourable to Quakers,

⁷³³ Anthony Pearson, *The Great Case of Tythes truly stated, clearly opened, and fully resolved* (Forgotten Books, Classic Reprint Series 2015) iv.

⁷³⁴ in *Acts and Ordinances of the Interregnum, 1642-1660* eds. CH Firth and RS Rait (London 1911) 996-997.

⁷³⁵ *Acts and Ordinances of the Interregnum*, *ibid.*

particularly since they frequently had a direct financial stake in the payment of tithes.

Writs of Prohibition

Whilst individual litigants could choose their court in some circumstances, royal courts guarded jurisdictional demarcation. Prohibition demonstrates the tension between the two jurisdictions and a manner by which the common law encroached on ecclesiastical territory.

A defendant wishing to plead the jurisdictional point and obtain a prohibition had to do so before the spiritual courts pronounced sentence.

Writs of prohibition were available in tithe causes in several instances. The following are examples:

i) *Indicavit*; where more than a quarter of the total value of tithes within any parish was being claimed in the ecclesiastical courts. Ecclesiastical court practice was for separate proceedings against individuals to be brought, rather than for parish tithes owed *en bloc*, and so the question of over a quarter of the total value would rarely arise in any one case, even if the totality of all tithes owed by separate individuals did. Such instances were rare, but this is potentially significant given the fact that Quakers cumulatively may have withheld more than a quarter of the total value of tithes within a parish. This may account for some of the clusters of proceedings in the secular courts against individuals that are shown in Section 3.⁷³⁶

ii) where it was alleged that the ecclesiastical court had exceeded its jurisdiction. Section XIV of the 1549 Act stipulated that a true copy of

⁷³⁶ The reason for this (should the issue arise) was that this may undermine the advowson (right to nominate a clergyman to a benefice) of the defendant's patron. An advowson constituted a property right that could be bought or sold. Such disputes were determined by the royal courts who claimed jurisdiction over lay debts and chattels and this made a fine distinction between some tithes, especially those which were commuted to money payments. In such cases, the ecclesiastical courts still claimed jurisdiction where the source of the debt was tithes.

the libel depending in the ecclesiastical courts must be provided to the King's Court Judge, with the *Suggestyon* for demanding the Prohibition, and provided a penalty in respect of an unsuccessful application for a Prohibition. The *Suggestyon* required proof by two witnesses within six months. If, after that period, the matter was unproven, *the partie that is ... hindered of his or their suyte in the ecclesiasticall Corte* was entitled to a Consultation with double costs and damages. Such costs and damages, whilst assessed according to the ecclesiastical courts' provisions, were amenable to enforcement as a debt in the King's courts without challenge. This, again, illustrates legislative support for ecclesiastical jurisdiction but reinforces the point made in Chapter Two that the ecclesiastical courts lacked practical enforcement powers.

- iii) where the plaintiff's *locus standi* as a parson was denied.
- iv) where a pleaded *modus decimandi* was denied. If the *modus* was upheld, there had to be a consultation, and an unresolved issue could then be referred back to the ecclesiastical court. Otherwise the prohibition stood.
- v) Limitation. Ecclesiastical and temporal laws had different rules of limitation: forty years or less and time immemorial⁷³⁷ respectively, as well as different requirements for witnesses.⁷³⁸ If the ecclesiastical courts sought to try a *modus* according to their limitation rules, a prohibition could be issued.

It should also be noted that, in relation to the manor courts, whilst writs of prohibition could not be issued, a means of challenging their jurisdiction was by demurrer. An example of this is discussed below.

⁷³⁷ Which was deemed to be from 1189.

⁷³⁸ Gibs 691 cited in Burn (n 691) 405. See also J Godolphin, *Reportorium canonicum, or, An Abridgement of the ecclesiastical laws of this realm* (London 1678) 366- 382 for detailed citations of tithe prohibition cases which demonstrates the range of issues.

Deliberate neglect to cultivate an area that was designated for tithes was, arguably a matter for the common law courts for fraud but (rather than prohibition) a consultation could proceed in the ecclesiastical court.

The above exposition of tithe law is intended to place Quakers' well-known refusal to pay tithes, and the nature of their sufferings as a consequence, in its legal context. It is through understanding the precise legal framework that surrounded tithes that the difficulties that they encountered can be better understood. The next section looks more closely at the nature of court proceedings concerning tithes.

3. Tithe Litigation

Introduction

By the seventeenth century, tithes were an entrenched and structural part of society and ecclesiastical governance. The collection of tithes was facilitated by both secular and ecclesiastical law. In general, English law supported the established church in relation to the clergy's entitlement.

Section IX of the 1549 Act prohibited a corporal oath on defendants in disputes over personal tithes:

*If any person refuse to paye his personall tythes in forme aforesaid, then it shall be lafull to the Ordinaries of the same Diocese where the partie that soe oughte to paye the sayde tythes ys dwelling, to call the same partie before him and by his discretion to examine him by all lafull and reasonable means, other than by the parties owne corporall othe, concerning the true payment of the said personall tythe.*⁷³⁹

In practice, Helmholz⁷⁴⁰ says this was treated as applicable to all types of tithe, the effect being to shift litigation to *instance* rather than *ex officio* causes within

⁷³⁹ copy supplied by Parliamentary Archives.

⁷⁴⁰ Helmholz (n689) 8.

the ecclesiastical courts because the latter required an oath. This Act also eliminated compurgation (whereby the accused swore to his innocence, supported by witnesses) from tithe disputes. The significance of this is that Quakers could be called to give evidence in tithe suits and the fact that they would refuse to swear was not an impediment (at least at this stage).

The existence of custom was a prime cause of litigation. The burden of proof upon a tithe payer who sought to rely upon custom was high. Simpson has shown how, in the early modern period, custom could be negotiated in settings such as church naves (as a formal space) or in less formally designated places such as houses.⁷⁴¹

Helmholz concludes that the majority of such cases settled by compromise⁷⁴² and⁷⁴³ 'Probably informal efforts to enforce the duty (to pay tithes) occurred at local parish level'. However, there is little remaining documentary evidence of this and it would appear, therefore, that the compromise of cases did not require a formal written agreement. The importance of this is that the evidence then had to consist of witness testimony, especially written dispositions and these were vital to establishing a custom. The precise procedure, as well as examples, are discussed below.

In Chapter Two, we saw that the aim of ecclesiastical legal process was conciliation. Ecclesiastical judges encouraged the parties to reach an agreement or *composition* on the immediate issue.

Quakers, however, flouted the normal methods of dealing with disputed tithes to whomsoever they were owed, since they objected to payment of tithes *per se*. This intransigent repudiation of societal norms suggests a deliberate and self-

⁷⁴¹ Paula Simpson, 'The Continuum of Resistance to Tithe, c.1400-1600' in *Pieties in Transition: Religious Practices and Experiences, c.1400-1640* (Ashgate 2007) 93-109. This discusses local papers from Kent that show such negotiations taking place "in situ" in the parish churches.

⁷⁴² Helmholz (n689) 11.

⁷⁴³ Helmholz (n689) 7.

conscious alienation which incensed tithe owners. An example of one particularly notorious controversy is provided below.

Given the importance of tithes to community relations, a community's toleration of Quakers' withholding tithes may have depended upon whether those who bowed to the law were generally sympathetic to Quakers or themselves anti-tithe. There is also local evidence of sympathetic neighbours in relation to distress of goods. For example: ⁷⁴⁴

Thomas Hewley, ...aged about seventy eight, was prosecuted by Arthur Savage, priest, for 3l. Prescription Money, and had taken from him his Feather Bed, Bedclothes, and a Cupboard, worth 5l. The Hardship of the poor old Man's Case so affected the Neighbourhood with Compassion, that when the Bayliff exposed those Goods to Sale, no Body would buy them at any Rate...

Helmholz remarks upon the lack of litigation over payment of tithes in principle,⁷⁴⁵ and that, in the main, payment of tithes was accepted by the law-abiding population. Such litigation as there was tended to concern factual disputes concentrating upon the quantity of assets from which the tithe was paid or the existence or nature of a custom or prescription governing its payment. Cummins,⁷⁴⁶ whose view inclines towards that of Helmholz, argues that focus upon litigation has skewed historical studies on tithes⁷⁴⁷ towards viewing them as inherently contentious.

Helmholz records that economic inflation gradually 'rendered the traditional amounts too small to meet the needs and desires of the clergy,' ⁷⁴⁸ so disputes over the inadequacy of a tithe or illegitimacy of a custom correspondingly increased.⁷⁴⁹ By the time of the Restoration, Spurr says that a third of the clergy

⁷⁴⁴ Besse (Sessions Trust 2008) 132.

⁷⁴⁵ Helmholz (n689) 25

⁷⁴⁶ Cummins (n728)

⁷⁴⁷ such as E Evans, *The Contentious Tithe: The Tithe Problem and English Agriculture 1750-1850* (Routledge and Kegan Paul 1976)

⁷⁴⁸ Helmholz, (n689) 18.

⁷⁴⁹ See, also, for example, Christopher Hill (n697) 100-105.

lived in poverty⁷⁵⁰ and their incomes 'fluctuated according to the types of tithes and dues to which they were entitled and on the local agrarian economy.'⁷⁵¹

However, there was clearly a great deal of litigation. Burn's exposition of tithes⁷⁵² is predicated upon the definitions established by canon lawyers, the outcomes of litigated cases and the requirements for pleadings as to the foundation of the elements of a case. Pearson says, referring to Cumberland in the 1650s, that for an observer to go *a little after Harvest, he may find the Justices so busie, as if they have little other work to be doing.*

The preamble of the Tithes Act 1536⁷⁵³ states:⁷⁵⁴

For as much as diverse nombres of evill disposed personnes inhabited in sundry ...places of this Realme, having no respecte of their duties to Almightye God... have attempted to substracte and withhold in some places the hole and in some places greate partes of their tithes and oblacions as well personall as praediall, due unto God and Holie Church, and...have attempted in late tyme paste to disobey contempt and dispise the processe laws and decrees of the Ecclesiastical Courtes of this Realme, in more temerous and large manner than before this tyme hath been seene...

The Payment of Tithes and Offerings Act 1540⁷⁵⁵ also recites *personnes contemptuously and commonly* subtracting and withholding tithes, especially those due to the laity who were unable to sue in the ecclesiastical courts until the passage of this Act. On the face of it, the preambles seem to address a national problem of withholding tithes but Professor Lewis cautions against leaping to such a conclusion and suggests that the preamble may be designed to reflect the fact that, like infant baptism, tithe was a burning issue and the statute may have been making a commitment in favour of tithes in that context.

⁷⁵⁰ Spurr (n715) 177.

⁷⁵¹ Spurr (n7015) 72.

⁷⁵² Burn (n691) 373-419.

⁷⁵³ 27 Hen VIII c.20.

⁷⁵⁴ Copy Statutes of the Realm provided by the Parliamentary Archive.

⁷⁵⁵ 32 Hen VIII c.7.

The Tithes Act 1536 imposed a statutory duty of every subject to pay tithes to the church. By section I, the vicar, parson, curate *or other partie in that behalve grieved* could pursue their claims before the ordinary of the diocese or other authorised judge. In the event of contumacy, any King's counsel or two JPs, were empowered to commit the offender *to warde* without *bail or maynprise* pending surety. Such power affected Quakers' experience and founded another grievance against JPs for supporting the clergy. The effect of this Reformation legislation can be seen to bolster the clergy's rights to tithe.

Tithe cases were complex and detailed. Helmholz sets out the common ecclesiastical pleading format in *causa subtractionis decimarum* (withheld tithes).⁷⁵⁶ The plaintiff's libel would commonly allege:

- His title as lawful incumbent of a church or lawful tithe farmer
- His prior and peaceable possession and his exercise of his right to receive specific tithes
- The legitimacy of the tithe demanded, obligations under *ius commune* and a *laudable custom and manner of tithing* in the location
- The defendant's possession of lands and chattels or crops within the parish
- Total value of the tithe demanded
- His legitimate demand for payment and the defendant's refusal
- The court's jurisdiction
- General prayer for canonical relief.

If double or treble damages were claimed, statutory forms, with a schedule of the number and kinds of animals or quantity and quality of crops were added to the pleadings. The defendant's answer addressed each of the plaintiff's points in order to narrow the issues. Most claims succeeded to some extent and so it was

⁷⁵⁶ Helmholz (n684) 11. See also H Consett, *The practice of the spiritual or ecclesiastical courts* ((London 1685) 316-333 which details the procedure from the initial steps to conclusion of the case, up to, and including taxation of costs.

important for defendants to minimise costs by agreeing or conceding certain points. By custom, ecclesiastical procedure also empowered the Defendant to make an offer in full satisfaction. If the Plaintiff refused and unsuccessfully persisted with his suit, he was liable to pay costs from the date of the offer.

To establish a disputed custom, witnesses had to depose to the fact from their own knowledge and to the fact they that had heard men before them confirm the same. Interrogatories were framed to provide evidence in accordance with the legal requirements for establishing a *modus*. A local example is given below.

Penalties for Withholding Tithes

Introduction

By its preamble, the 1549 Act⁷⁵⁷ supplemented the two Henrician Tithe Acts because *in the severall Acts manye and diverse thinges be omitted and lefte out, which were convenient and verie necessarie to be added to the same.*⁷⁵⁸ The Act contained 16 sections and provisions to this end.

Double Damages

Double damages, in addition to costs, were, by section II, designated for recovery in the ecclesiastical courts.

Treble Damages

Section I provided a penalty of treble value of the tithes to be forfeited by anyone who did not divide and set out praedial tithes in the upper kynde according to the custom *within fowerty yeres next before the making* of the Act. Claims for treble damages had to be taken in the common law courts.

Professor Lewis notes that, for the technical reason that the Edwardian statute imposed the penalty of treble damages upon the specific failure to set out the tenth in sheaves, historically it was uncommon to rely upon an action for treble

⁷⁵⁷ Quotations are from the copy extract of Statutes of the Realm, 55-58 (Courtesy of Parliamentary Archives).

⁷⁵⁸ Copy Statutes of the Realm, *ibid* 56.

damages.⁷⁵⁹ However, the entries in Besse show that Quakers frequently suffered this penalty.

The potential severity of penalties for non-payment – for treble damages in particular – was not immediately appreciated by Quakers. Indeed, if, as Helmholz, says, in the main, payment of tithes was rarely challenged per se, the ordinary citizen would be unlikely to have encountered these penalties. Quakers were clearly surprised and sought legal advice.

Robert West's Legal Opinion, 1680⁷⁶⁰

The parson hath his election to sue at common law or in the spirituall court under Edward VI for treble damages and I know no way to avoid the Action at law but by setting out the Tythes but the plaintiff shall recover no costs.

An action will lie for as many years arrears as are due and there is no means to compel the plaintiff to try it for one year only. I think it fairer to tell the truth than to flatter you into a suite wherein you will be so certainly overthrown.

This is a clear instance of Counsel **not** telling Quakers what they wanted to hear.

Excommunication

'The natural assumption of the English civilians was that if a man failed to pay his tithes, he would be summonsed to appear before an ecclesiastical court and ordered to fulfil that duty, by excommunication if necessary.'⁷⁶¹ However, under canon law, the use of excommunication to enforce tithe was questionable. Decretum⁷⁶² provided a measure of support for excommunication, as did an early synodic statute. 'The better canonical opinion was that to excommunicate one's own parishioners in order to collect the money was to act as a judge in one's own cause.'⁷⁶³ Helmholz goes on to say that it undoubtedly happened. This

⁷⁵⁹ Lewis (n690).

⁷⁶⁰ Book of Cases YM/MfS/BOC/1.78 (Quaker Archive).

⁷⁶¹ Helmholz (n689)7. Consett (n 756) 317-8 makes the point that the originating monition warned of the penalty of excommunication at the outset.

⁷⁶² De Cons Dist 11 c95 cited in Helmholz (n689).

⁷⁶³ Helmholz (n689)8.

research has found extensive evidence that excommunication of Quakers in the North West for withholding tithes was rife between 1661 and 1685.

Upon close examination, section XIII of the 1549 Act provides the English authority for this and for the issuing of a writ de excommunicato capendo which is discussed in the next chapter. Upon determination of unlawful subtraction of tithes in the ecclesiastical courts, in the absence of an appeal or prohibition:

*it shall be lefull to everye ... Judge ecclesiaticall to excomunycate the saide partie so as afore condemned and dysobeyinge, ..., yf the sayde partie excommunicate willfullye stande and endure still excommunicate by the space of fourtie dayes nexte after, upon denuniacion and publicacon thereof in the parishe Church of the place where the partie ...is dwelling..., the... Judge ecclesiasticall maye ...signifye to the Kinge in his Corte of Chauncerie of the estate and condicion of the saide partie so excommunicate, and thereupon ... require the processe De excommunicato capiendo to be awarded agaynste everie suche person as hathe bene so excommunicate.*⁷⁶⁴

This provision was not contained in the Henrician statutes. Thus, excommunication must have been deemed *convenient and verie necessarie*.

Imprisonment

Committal to prison could follow either a writ de excommunicato capiendo from the ecclesiastical courts, and then a significat issued by the bishop to the magistrates, or under a secular process for non-payment of an adjudged debt.

Outlawry

This was rare but there are two examples in the North West, in 1664 and 1667. Braithwaite⁷⁶⁵ quotes at least ten instances cited in Besse for the country as a whole. Outlawry was originally a criminal sanction when a defendant fled justice but it had become extended to civil cases where a defendant failed to appear in

⁷⁶⁴ Cited from copy extract *Statutes of the Realm* 57 (Courtesy of Parliamentary Archives).

⁷⁶⁵ Alfred W Braithwaite, 'Early Tithe Prosecutions, Friends as Outlaws' [1960] 49 *Journal Of Friends Historical Society* 148-156.

court, governed by strict rules. The procedure started with a writ *Exigent*, addressed to the Sheriff to *cause (the defendant) to be exacted from County Court to County Court, until he be outlawed according to the law and custom of England if he shall not appear*.

A tithe owner could seize the outlaw's goods.

Accordingly, procedures leading to severe penalties over and above a determination that tithes were due or fines for non-payment were readily in place.

4. Criticism of Tithes

In England at least, especially in the North West, there was a longstanding undercurrent of antipathy to the tithe system amongst certain sectors of society, which, occasionally, manifested itself in localised tithe rebellions.

Margaret James asserts that the issue of tithe reform, which so threatened vested interests, contributed to the Restoration.⁷⁶⁶

The extensive seventeenth-century debates ranged beyond theology to social, economic, political, legal and practical objections. In 1618, the common lawyer, John Selden⁷⁶⁷ published a controversial treatise challenging the ecclesiastical view of divine entitlement, although he did not attack payment of tithes per se.

More radical views were vented during the Interregnum, when Quakers and other, such as Levellers and Diggers, propounded their opposition to the payment of tithes on social, political and religious grounds. Barry Reay⁷⁶⁸ postulates that Quaker's arguments against tithes 'rested on a wide range of social and economic objections' and 'a deep hostility to the social order.'⁷⁶⁹

⁷⁶⁶ Margaret James, 'The Political Importance of the Tithe Controversy in the English Revolution 1640-1660' [1941] 26/101 History, Journal of the Historical Association 1-18.

⁷⁶⁷ John Selden, *The History of Tithes That is the Practice of Payment of Them, the Positive Laws Made for Them, The Opinions Touching the Right of Them: A Review of it also annexed which both confirms it and Directs the Use of it* (Early English Books Online, EEBO Editions 1618).

⁷⁶⁸ Barry Reay, 'Quaker Opposition to Tithes, 1652-1660, Past and Present', in Nicholas Morgan, *Lancashire Quakers and the Establishment, 1660-1730* (Ryburn Academic Press 1993) 98-120.

⁷⁶⁹ The latter argument is challenged by Morgan, *ibid*, 172.

Quakers relied upon the New Testament.⁷⁷⁰ The (then⁷⁷¹) leading early Quaker, Antony Pearson, a Cumberland JP, argued that payment of tithes to the clergy, in effect, denied Christ's coming, were imposed by Rome and, were without authority in the reformed church. They represented the degeneracy of the established church, the more so since, under Mosaic law, tithes were intended to support the poor and, under the English established church they were misappropriated to supporting the clergy.⁷⁷² Besse echoes this in his introduction.⁷⁷³

The issue of parish entitlement to tithes was attacked by Pearson⁷⁷⁴ as 'corruption of peoples' choice to pay tithes where they felt best' for which he blamed Pope Innocent for having 'erected' parishes, appointing priests to each one and establishing a debt to the priest by way of tithes as opposed to voluntary offering.

Quakers were ambivalent over impropriated tithes which were, in reality, now lay property and so the theological argument against them was harder to maintain.⁷⁷⁵

There was also the simple fact that Quakers did not attend church or receive ministry or other benefit from the clergy and they objected to having to paying for something they neither received nor wanted.

Tithes were paid unequally throughout the country as between rich and poor and between urban and rural areas. Personal tithes were predominant in urban areas and these had declined from the sixteenth century onwards.⁷⁷⁶

⁷⁷⁰ This section does not critically examine the theological and intellectual foundation of Quakers' opposition to tithes. These are discussed in early works such as: Thomas Ellwood, *The Foundation of Tythes Shaken* (London 1678), and Anthony Pearson, *The Great Case of Tythes* (n733) and later studies for example: Rosemary Moore, *The Light in their Consciences, The Early Quakers in Britain, 1646-1666* (Pennsylvania State Press 2000); Morgan (n768).

⁷⁷¹ He ceased his adherence to Quakers in about 1662.

⁷⁷² Pearson (n733).

⁷⁷³ Besse (Sessions Trust 2000) v.

⁷⁷⁴ Pearson (n733) 20

⁷⁷⁵ Moore (n 768) 118.

Pearson⁷⁷⁷ pointed to the prevailing anomalies:

One man pleads he is to pay nothing to a minister, because the Pope has given him a dispensation, and made his land tithe-free. Another man saith he hath a prescription to pay but a penny (it may be) for the value of a shilling. Another saith he hath converted his lands into pastures, and that by his artifice so ordered it that little is due for tithes. Another saith he dwells in a city or market town, and hath no land, though it's like he gains more by trade than ten poor countrymen that pay tithes do by their lands. Another saith he pays tithe to an impropriator, and he cannot afford to pay both him and a minister...The rich generally pay little, and the poor husbandman bears the burden.

Quakers' opposition to tithes was overt. Reay⁷⁷⁸ cites their 1659 campaign which produced 22,000 signatures. The restoration of the monarchy was neither here nor there so far as their conscientious objection to tithes was concerned and so they did not cease or ameliorate their opposition for which they were willing to suffer. Thus Thomas Atkinson wrote in 1677-8:⁷⁷⁹

... for Worshipping of God shall be left without Herd in the Stall, Bed to lie upon, Conveniences for Food or Life. But we say, for all this our God is gracious, and ought to be feared and worshipped; he gives and he takes away...; and it is in Mercy to his, which endures forever. And of their Adversaries Cruelty there will be an End in his due time and season...unless they be reconciled by true and timely Repentance, which is the Desire of the Hearts of the Upright, who truly love their Enemies, and such who use them despightfully, as was the Doctrine of our Lord and Master whilst here on Earth.

⁷⁷⁶ Hill (n697) 90.

⁷⁷⁷ Pearson (n727) 64.

⁷⁷⁸ Reay, *Quaker Opposition to Tithes, 1652-166* [1980] 86 Past and Present (OUP) 98-120.

⁷⁷⁹ Thomas Atkinson, *The Christian's Testimony against Tithes, In an Account of the great Spoil and Rapine committed by the Bishop of Chester's Tythe -Farmer at Cartmell in Lancashire; upon the People there called Quakers, in the years 1677 and 1678*. Printed in the Year 1678. Quaker Archive Box 3/1 14063).

5. Quaker Tithe Testimony

Introduction

Opposition to tithes constituted a vital aspect of Quakers' theological beliefs and their communal attitude.

From 1669, the Lancashire formal quarterly meetings required Friends to collect testimonies against tithes, the equivalent of a solemn statement of membership.⁷⁸⁰ Swarthmoor monthly meeting minutes set up an inquiry into tithe testimony on 9th day of the 9th Month 1669.

Morgan observes that some of the wording followed that of the Quaker polemicists,⁷⁸¹ which illustrated Quakers' increasingly centralised positioning. Christopher Simson, of Cartmel, testified:

*I pay no tithes nor steeplehouse lays, nor none for me with my consent, but bear my testimony against knowing the priesthood is changed, and Jesus Christ is come, of which I am a witness.*⁷⁸²

The Lancashire Women's quarterly meeting stipulated, in 1675:

where any be convinced, they are to give in their testimonies in writing against tithes etc. to be recorded with the rest, that so all may be kept in good order, and that we may stand one by another and join in our testimony for Christ Jesus, our redeemer and saviour. ⁷⁸³

Thus, Mary Taylor of Cartmel stated:

*...for the light, life and power the Lord God is about to establish his truth, and to reign over all tithe payers and tithe receivers.*⁷⁸⁴

An entry for 11th day of the 6th Month of 1668 shows that the Swarthmoor monthly meeting⁷⁸⁵ ordered:

⁷⁸⁰ Morgan (n768) 181-187.

⁷⁸¹ Morgan (n768) 186.

⁷⁸² LQMMM, vol 1T/T: Swarthmore, 1679, quoted in Morgan (n768).

⁷⁸³ SWMMM, vol 1 5/8/1675, quoted in Morgan (n768)182.

⁷⁸⁴ LQMMM, vol 1T/T; Cartmel, 23/7/1675, quoted in Morgan (n768).

⁷⁸⁵ Swarthmore Monthly Meeting Minute Books, 1668-1798. (BDFC/F/2 BOX 16 Cumbria Archive, Barrow-in Furness).

That Friends do bring in an account of all their sufferings in their meetings as to the spoiling... or distraining their goods whether for tythes, repairs of steeple-houses, or any other thing for Conscience sake.

An undated Notice to Friends for Monthly and Quarterly Meetings from Fox stated that

if summonsed or by writ have to go to London for sufferings, the meeting should provide a letter for them and assist them if poor and provide abodes if they have to go there and back.

This mirrors an entry in the Book of Cases, and constituted another centrally ordained message to the regions. It shows that the Society recognised the testimony's effect and was willing to support those who suffered for it.

Complaints of poverty, imprisonment, and seizing of goods in excess of the value of tithes were genuine, but this suffering was self-imposed and as a result of deliberate, sustained contravention of the law rather than a campaign against Quakers. The Quaker, Alfred Braithwaite also makes this distinction. His article⁷⁸⁶ is balanced in so far as he acknowledges the difficulty posed by Quakers to legitimate tithe holders and he distinguishes proceedings for the recovery of tithes from persecution. The severe and vindictive cases notwithstanding, he says that 'the extreme sufferings... with regard to tithes arose ... from the inappropriate and cumbersome nature of 17th-century legal procedure.'⁷⁸⁷ I suggest that what was 'inappropriate' was what happened when tithe law was challenged because of the severity of penalties that attached, as discussed above.

Internal Dissent

Morgan does not cite the local condemnations for not maintaining the testimony as evidence of dissent from the corporate tithe testimony. This rarely features in Quaker histories except as implied criticism for challenging the leadership or moral weakness and laxity. There are hints that local women who encountered the severe consequences of non-payment needed some persuasion to maintain

⁷⁸⁶ Braithwaite (n765).

⁷⁸⁷ Braithwaite (n765) 149.

their opposition. The extent to which ordinary Quakers were *ad idem* on the principle of withholding tithes is uncertain.⁷⁸⁸

In an undated record,⁷⁸⁹ George Fox said no-one should be invited to men's meetings that *hath done badly (or pay tythes)* unless they bring their condemnation with them *as it will keep your meetings solid...*⁷⁹⁰ It was also recorded when a transgression had been absolved.

Swarthmore⁷⁹¹ kept

A Record of Condemnations and paper of denyall and disowning those who make profession of the blessed truth of god and through unwatchfulness is led into sin and profaneness and refused to owne their condemnation for sure their obedience.

Testimonies include lustful behaviour with father's servant, disorderly drinking, and, included as '*unwatchfulness*', being unfaithful regarding tithes.

The Swarthmore monthly meeting minute books⁷⁹² show the difficulty in maintaining discipline and provides definitive evidence that some Quakers departed from the testimony.

13th of 2nd Month 1669. It is ordered by friends ...to be sent to Richard Britain... Richard Simpson is desired to go onto him ... to admonish him not to suffer Timothy Askew nor any person to pay tithes for him...betrayal of Christ to do so.

An entry on *11th day of 3rd month 1669* shows that departure from the commitment to withhold tithe was seen as a betrayal of *those Friends who have suffered spoyling of goods and loss of life itselfe by imprisoning.*

⁷⁸⁸ That is to say that this research is not sufficiently focused on the question of internal dissent to draw a conclusion or offer a reliable opinion.

⁷⁸⁹ but, by virtue of its place in the Minutes, probably mid-1670s.

⁷⁹⁰ Swarthmore Monthly Meeting Minute Books, 1668-1798. (BDFC/F/2/Box 16, Cumbria Archive, Barrow-in Furness).

⁷⁹¹ Testimonies against Sundry, 1676-1758. (BDFC/F 97 Cumbria Archive, Barrow in Furness).

⁷⁹² BDFC/F/2 Box 16.

The Women's meeting minute book concerned discipline, looking after the ill and poor, and admonishments against the unfaithful towards the tithe testimony.⁷⁹³

A wholesale restatement of their values was sent out from London the 27th day of the 3rd Month, 1675 and is neatly copied into the Women's minute book,⁷⁹⁴

For as much as wee are deeply sensible of the sorrows and sufferings that have come upon the Church of Christ in severall places, by reason of certain disorderly proceedings of some professing the Truth, which have occasioned many questions and debates amonge some Friends, and our Advice being desired thereupon; we doe in the name and Counsell of God, hereby signify our sense, advice and Judgements.

The items included:

Testimony against Tythes – all those that oppose, slight or neglect our testimony be looked upon and dealt with as unfaithfull to the ancient testimony of truth.

Greaves⁷⁹⁵ cites a similar drive in 1679 in Cheshire and the fact that some Quakers made arrangements with non-Quakers to make payments on their behalf. On the other hand, Besse records several objections from Quakers when payment to secure their release from prison was made by their family or neighbours, without their consent.⁷⁹⁶ Thomas Robertson was freed from Kendal prison by his relatives who paid the £5 value of tithes: *He afterwards expressed such Dislike of the seeming Kindness of his Friends that his Persuasions induced them to promise not to offend him in that kind anymore.*⁷⁹⁷

In summary, opposition to tithes, which stemmed from the beginning of Quakerism, but in a slightly more favourable climate, was embedded and re-

⁷⁹³ BD Swarthmore MM (women) 1671-1700.

⁷⁹⁴ Along with several of George Fox's epistles.

⁷⁹⁵ Richard L Greaves, 'Shattered Expectations? George Fox, the Quakers, and the Restoration State, 1660-1685' [1992] 24/2 Albion: A Quarterly Journal Concerned with British Studies 237-259 (North American Conference on British Studies <http://www.jstor.org/stable/4050812>. Accessed 10-04-2018. 247).

⁷⁹⁶ Besse (Sessions Trust 2000) 20.

⁷⁹⁷ Besse (Sessions Trust 2000) 22.

inforced during the Restoration notwithstanding the effect that it was having on individuals and families.

6. The Controversial Use of Manor Courts

Introduction

Quakers sought Counsel's advice on county court jurisdiction at least twice.⁷⁹⁸

- i. *Certain queries propounded concerning the Jurisdiction of the County courts to hold pleas in a suit for withholding tithes in the said courts and the advice of Serjeant John Merefield and Counsell Jo Haggart hereupon.*

1684. The two counsels confirmed there was no jurisdiction and action would lie against a sheriff, clerk and bailiffs seeking to exercise enforcement of an illegal process.

Here are very serviceable papers to enter into your Quarterly book wherein you see that they have no power to sue for tythes in the County Courts...

- ii. Thomas Corbett was asked: *Whether the County Court has jurisdiction on a writ of Justices in cases of Tithes?*

A. A County Court hath no power to hold plea for any case arising out of an Act Of Parliament unless the Act gives it such power. The statute of 2 Eliz. 6 for not setting forth tithes doth not give the County Court such power.

Quakers followed with subsidiary questions:

- *If so, may a Defendant not demur to the jurisdiction of the Court?*
A. The Defendant may plead to the jurisdiction of the court and it is best and safest to do so. Also he may demur by Declaration.
- *And if there are demur drawn and the court accept it not, or in case demur be put in but Judgement suffered whether action doth not arise thereupon to the defendant against the freeholder that give the Judgement in a case of tythes whereby Law (it seems) they are not proper Judges or against whom the action has whether against*

⁷⁹⁸ Book of Cases (YM/MfS/BOC/1 Quaker Archive).

the Sheriff or County Clerk...? And when best to be brought before Execution or after as to advantage of the party that sues?

A. If the Court proceeds where it hath not Cognizance of the Cause and the proceedings and before no lawful Judge coram non Judice and both Sheriffs County Clerks Bailiffs and Freeholders are lyable to an attainr. At the suite of the party injured for that they take cognizance of a thing whereof the Cause hath not Cognizance nor ought to hold...

Counsel provided two instances of this⁷⁹⁹ in other parts of the country. One of these, by way of example, was a 1668 case of William Bishop against John and Edward Carbott. In this county court action for debt arising from withholding tithes under the statute of Edward VI, Counsel, Thomas Hunt, had advised to plead to jurisdiction; *no Court can impose a fine but a court of Record.*

Notwithstanding this, the court gave judgement for the plaintiff. Counsel's letter to his client, Carbott, advised:

...With all the Judges of the King's Bench who gave their opinion that the County Court had no Authority or Jurisdiction in the Cause. And upon my Argument they did grant a Prohibition which will Arrest the proceedings in that Court and stop your adversary forever having any benefit of that Judgement again.

Greaves,⁸⁰⁰ cites Dorset Friends' compilation of legal precedents concerning the county courts' jurisdiction over tithes, including Hunt's said opinion, as a 'modest example of legal engagement' in support of his argument that Quakers' engagement with political and legal matters during the Restoration modifies the traditional portrayal of their quietism in this period. His example is provided in isolation. However, once combined with the local instances cited herein, as well as the generic advice that central Quakers obtained, I contend that not only in respect of tithes, but as I argue throughout, this was an instance of not merely 'modest' but serious and sustained engagement.

⁷⁹⁹ part Latin, part English.

⁸⁰⁰ Greaves (n795) 244.

When Besse identifies secular courts, I have recorded them on the database. So far as local inferior courts are concerned, these included one in Hornby Court, 1683; four cases in an unspecified wapentake court in 1677; one in Kendal court; and eight proceedings brought by Lady Duckett in an unidentified county court in 1667. The latter resulted in warrants which were quashed by certiorari – another example of a successful jurisdictional challenge. There were several assize cases, and forty-two in the Exchequer. Ecclesiastical courts include unspecified consistory courts, and Chester and Richmond, which predominate. Unfortunately, the majority of courts are not identified.

The Cartmel Tithe Controversy

Introduction

Morgan⁸⁰¹ cites Thomas Preston's campaign against Quakers and the other the refuseniks of Cartmel in order to cover his various debts. The matter was also the subject of a tract written by one of the affected Quakers, Thomas Atkinson,⁸⁰² and of a recent article on social history.⁸⁰³ This origins of this notorious and bitter local conflict pre-dated Quakers, but it exemplifies harassment as well as the importance of tithing custom in community relations.⁸⁰⁴ I show additional material which demonstrates the legal devices, and the use of connections with JPs and clergy, that a tithe farmer might use to pursue his or her claim. I have included some of the detail from seventy-three-year old Atkinson's tract. Preston called him *that Old Rogue of all Rogues* and he was not dispassionate. Nonetheless, his account is compelling. It demonstrates attempts to proceed through the local wapentake or leet courts (Lonsdale and Cartmel respectively) notwithstanding their lack of jurisdiction. The tithe farmer Thomas Preston, the

⁸⁰¹ Morgan (n768) 203.

⁸⁰² Atkinson (n779).

⁸⁰³ James Mawdesley, 'Quakers, Tithe Opposition, and the Presbyterian National Church: The Case of Cartmel, Lancashire, c.1644-1660' [2011] 24/3 Journal of Historical Sociology 381-408. This provides illuminating detail of an earlier stage in this intractable local battle, showing that contentious issues from at least the Interregnum continued through the Restoration. Preston was one of many who were sequestered under the Cromwellian regime. The centralised Committee for Compounding with Delinquents administered fines that sequestered landlords could pay in return for resuming full ownership of their estates. The tithe opposition in Cartmel was not confined to Quakers but stemmed from a longstanding objection to the Preston family's efforts to raise revenue to cover their debts by raising tithes.

⁸⁰⁴ *ibid* 384.

younger, generally commenced suits in the Court Barron of Cartmel. He had been able to pursue his tithe claims there, seemingly, for decades, and perhaps an unchallenged custom had taken root in that respect.

Atkinson reports Preston's threat on 7th March 1677:

His business was to acquaint them, That in case they would submit to the Jurisdiction of Cartmell Court, as they had done formerly, and let him recover his Tythes it should be well; but if not, he would Persecute them so, that he would rout them out, Root and Branch, Foundation and Generation; and would pull down their House over their Heads, and trail them in Carts.

The Quakers remained defiant:

the ...Threats and Menacings had so small effect that he had no answer to his desire. For they being satisfied in Conscience, that they ought rather to obey God than Men...But Christ who is our Teacher, our High Priest and Law-giver, we cannot deny in maintaining a Tythe Priest and Hireling, who stands in opposition to him. And also knowing that such Inferior Courts ought not to try or hold Jurisdiction of any case of Tythes they refused to comply with him.

The circumstances indicate an abuse:

to maintain the usurpation of the inferior Courts, to bow-beat the Law, to inforce payment of illegal demands a Shoeinghorn for his Interests, and a means to perjure his Agents.⁸⁰⁵

Preston and his dodgy informers, George Rigg and Edward Stones,⁸⁰⁶ swore to the fact of an unlawful assembly under the Act and procured a conviction from JP Myles Dolding, Preston's brother-in-law. The use of the Conventicles Act as a device to obtain tithes undoubtedly occurred fairly frequently. In this instance, it was suggested by the local vicar, John Ambrose:

who confessed in discourse, that he advised the said Preston to set up Informers against the said People upon the Act made for suppressing Conventicles, and to get his Tythes out of the Goods which might be taken on the Act...

⁸⁰⁵ Atkinson (n779).

⁸⁰⁶ they were later indicted at Lancaster quarter sessions and found guilty of perjury.

Preston obtained a warrant of distress on 18th March 1677, naming thirty-five people. The following day, Preston, Rigg, the chief constable, and two sub-constables came into the field where Francis Fleming was working. They demanded £20 from him as a preacher, and 5s for his wife (although she was not at the meeting having just delivered a baby). By way of distress they: *drove away from him his two Cows, which is all he had...Preston declared if he had 40 cows he would not leave him one.* He further threatened that if Fleming would not submit to let him recover his tithes in Cartmel court, he had a second information against him for £40 for preaching and 15s for his wife, and he would make them sell their land and would bring in others who would pay him his tithes. Several Quakers suffered disproportionate distraint on the same warrant.

Attempts to Demur to the Manor Court's Jurisdiction

Around July 1677, the Court proceeding in the Suits commenced there, the Defendants demurred to the Jurisdiction of the said Court, as being not capable by Law to hold Pleas, or to determine any such Causes...upon which Preston being stopt in his Suits, brake out in great Rage and Wrath ...

On 16th September 1677, Preston summoned them to Cartmel Baron's court before JP Carwin Nicholls, *a person of moderation, used some Perswasions to draw the Persons there summoned to submit to a Tryal there; but the Defendants being advised and satisfied, that by Law they ought not there to be tried, again demur'd to the Court's Jurisdiction.* The furious Preston said (holding up the Act against Conventicles in his Hand) *I will prosecute this against you till I leave you not a Groat, unless you will submit to the Court.*

This was followed by Lancaster quarter session proceedings on 9th April 1678, whereby the constables paid the proceeds of the goods they took away and sold *at 27s. being much less than the value thereof.* This included £9 *for the King's part,* as determined under the Conventicles Act 1670.

On 14th May 1678 Preston summonsed several to appear next morning at a wapentake court held at Loynesedall (Lonsdale) in Lancashire, at W. Turbuck's house. Thomas Lamplagh, *a Lawyer sate as Steward of the court.*

The Quakers:

desired as their Right to appear by their Attorney, one Edmund Gibson, who, as formerly, offered a Demures to the Jurisdiction of that Court, which the Steward refused to accept (although by Law he ought not to deny it).

... The Steward pressing for another Answer, they desired a Copy of the Plaintiff's Declaration in writing, and Time to plead till next Court, both which Requests by Law the Steward could not deny (as he was often told) yet he arbitrarily against the Law, Right and Custom, over-ruled them, calling for the Plaintiff's witness, Rigg who, despite the pending Indictment for perjury, stated that the individuals were indebted to Preston for the various sums claimed for Bushel-Tythes, which is pretended to be due by virtue of an Agreement or Composition heretofore made with Thomas Preston the elder, by several of the Parish to pay during his Life; and although it could not be proved that any of the said persons had subscribed to that Agreement, or agreed to pay such Bushel-Tythes... yet against all Justice, Law and Equity the said Court, upon the bare Oath of Rigg, without giving any copy of the Plaintiff's Declaration, or Time to plead, immediately passed Verdict and Judgement against them for the said respective sums.

Unfortunately, there is no further record regarding the demurrer and it appears that the court proceeded to determine the matter despite the Quakers' engagement of a lawyer to argue its lack of jurisdiction and procedural flaws.

There was no clear route to appeal from such courts. The legal advice that Quakers obtained centrally, set out above, was that anyone executing the judgement was liable to attain. Alternatively, the proceedings could, hypothetically, have been stopped by a prohibition or by certiorari, as had occurred locally in 1667. One can only surmise that there was no appetite or financial means to pursue such redress or that it was deemed tactically unwise,

unless the ambivalence over the use of a legal defence that is referred to in the introductory chapter had a bearing.

There does not seem to have been any ambivalence regarding appeals in tithe cases on other bases. Fell and others appealed on the grounds that the original process was not served, and that the surrogate, Craddock, who issued the warrants against them was not independent since he had determined the original proceedings.⁸⁰⁷ Further appeals were lodged by Roger Haydock and Heskin Fell in 1674 following proceedings brought by the rector of Standish, Lancashire, Ralph Brideoake.⁸⁰⁸ Tithes formed a significant proportion of his income in 1670: £94 of £400 per annum made up of glebe rents, perquisites, and other income.⁸⁰⁹

Another appeal,⁸¹⁰ from Carlisle consistory court in 1674 was from Thomas Langhorne and John Lambert against proceedings brought by Lancelot Hutchinson, vicar of Askham, Westmoreland. The proctor was Henry Squire and the advocate was Henry Watkinson. They were two of the prominent ecclesiastical court personnel in the Northern Province mentioned in Chapter Two.

Distress and Selling at Undervalue

Atkinson alleges that the next day the bailiffs came to distrain the goods without a warrant to do so.

One neighbour desired the bailiff to return one of the two cows he'd taken from Thomas Barrow "and if one was not enough he would pay the over-due" but the Bailiff refused [and] went "forthwith" to Cartmel Town and sold them at under rates out of market on non-market day. The Bailiff should have had a Writ of Vendition exponas⁸¹¹ to empower them to sell the same.

⁸⁰⁷ Details are contained in Chapter Eight.

⁸⁰⁸ Trans Cause Papers 1674/5 Ex CPH3033 W J Sheils: *Ecclesiastical Cause Papers at York: Files Transmitted On Appeal 1500-1883* (Borthwick Texts and Calendars: Records of the Northern Province 9, 1983).

⁸⁰⁹ Spurr (n715) 177.

⁸¹⁰ Trans Cause Paper 1674 ex. CPH 3178.

⁸¹¹ this is indicated in Chapter Four.

Selling distrained goods at undervalue is also discussed in the Conventicles chapter and was a major complaint of sufferings. Atkinson's records of the neighbour's actions indicate that there was a degree of community solidarity as well as revulsion at the Quakers' maltreatment.

Challenging a Modus

The Quakers also contested the *modus decimandi* which had been a long-standing local issue amongst the wider community. As has been described above, there was a set procedure to challenge a tithe custom.

This following is an extract from Interrogatories in Kilner and others v. Thomas Preston.

Interrogatories to be administered to witnesses to be ... sworn and examined on the part and behalf of William Kilner, John Barrow and others.

There were thirty-seven interrogatories, from which the following are extracted to indicate the precision with which proceedings concerning disputed modi were conducted:⁸¹²

- *Do you know the Defendant in the said suit, do you know the parish, manor of Cartmel aforesaid? How do you know and how long have you known the same?*
- *Do you know or have you heard that the said ...or/and how many ... of have used and had a custom to pay a modus decimandi to the Rector of Cartmel for the time being in lieu and satisfaction of all the tythes corne and grain ...knowing upon sayd...and how long have you known the sayd instance to continue?*
- *How in what manner and by what name or means ...said parties were payd a modus decimandi as aforesaid known and distinguished from other owners of ... messuages ffarmholds and tenements within*

⁸¹² *The Joint and Several Answers and The Further...severall answers of William Kilner and others re Bill of Complaint of Thomas Preston. Tithe Disputes BDX 176/1/113-117*(Cumbria Archive, Barrow in Furness).

the said manor were paid tythe in kinde to the Rector of Cartmel aforesaid ...being and ...not knowne and distinguished by the ...Bushell Tythes or by some other and what mean or means.

- *What quantity of...grains and what kinde of...or grain did you... John Barrow pay or use to pay Tythe ... or ... ffarmhold now in his possession to the Rector of Cartmel for the time being as you know or can depose*
- *Do you know or have you heard how much money was payd in George Preston's time for a Bushell ...Oates?*

Besides the obvious rancour and social historical interest, as well as evidence of persecution of Quakers, from a legal historical perspective, the example of the Cartmel tithe case displays machinations surrounding the choice of and challenge to manor courts as a forum for tithe suits, the interplay between gentry and clergy as plaintiffs, and the procedure regarding disputed customs.

7. Cases involving Quakers in the North West

The Status of Plaintiffs

The database shows seventy-one proceedings brought by lay proprietors. There are, however, a large number of unknown prosecutors and the total number of tithe cases was two hundred and ninety-seven, the majority of which (two hundred and thirteen) were brought by clergy. Lay plaintiffs included bailiffs, sequestrators, tithe farmers and impropiators. Justices of the peace predominate in Besse's account (but these will not have been plaintiffs). Four plaintiffs, the Countess of Derby, Lady Katherine Pye, Mary Woodburn (cited as a tithe farmer) and Lady Elizabeth Duckett were female and they pursued their claims in lay courts.⁸¹³ Elizabeth Duckett's husband, John, had previously brought proceedings in the ecclesiastical court.

The Kendal vicar, Brownsword brought ecclesiastical proceedings for withholding tithes and Easter-offerings against Robert Barrow, Miles Bateman,

⁸¹³ Female plaintiffs would, most likely, have sued in their own capacity as widow or executrix. This information is courtesy of Professor Andrew Lewis.

John Fell and others in 1666 and 1668. The 1668 proceedings were heard in Richmond, by Thomas Cradock, acting as surrogate. These do not appear as such in Besse, although their later appeal against excommunication does.⁸¹⁴

When they are analysed through the database, many of the cases recorded in Besse indicate that multiple claims for tithes were brought at the same time. Edmund Ashton brought a batch in an (unspecified) ecclesiastical court in 1684. Arthur Savage brought a large number of proceedings in 1674, 1676, 1682, as did Edward Wilson in 1681, and John Ambrose, the vicar of Grasmere, in the Exchequer, 1682.

It was not possible to bring a 'class action', so defendants were sued individually, but the fact that a number of cases were brought together raises the question of whether this was part of a campaign against the particular Quakers as a group on religious grounds, or a personal vendetta, as is implied in the collection of records of sufferings. It also raises the issue of whether the impetus for many of these prosecutions was that 'widespread and protracted opposition'⁸¹⁵ was seriously undermining clerical livings or lay impropiators' revenues.

Sir George Fletcher of Hutton, a landowner, MP and a JP, reputedly extracted tithes 'by every engine that the law placed at his disposal to exact.'⁸¹⁶ Besse's work, in itself, does not provide evidence of a vendetta on Fletcher's part: only ten proceedings against Quakers attributed to Fletcher were brought in the Exchequer in 1664 and 1684 respectively. This example would not establish the prospect of a concerted campaign against Quakers non-payment of tithes, but the proceedings all resulted in imprisonment, following their refusal to swear on Oath to their Answers given in the Exchequer. Besse records that the tithe values of these cases were between 6d and 1s. Since the defendants had to travel two hundred and fifty miles to London to defend themselves, he asserts Fletcher's 'purpose being not so much to recover anything, as to perplex and harass the

⁸¹⁴ This is discussed in Chapter Eight.

⁸¹⁵ Reay (n778) 111.

⁸¹⁶ Richard S Ferguson, *Early Cumberland and Westmoreland Friends – A Series of Biographical Sketches of early members of the Society of Friends in those Counties* (Bowyer Kitto 1871).

poor men.’⁸¹⁷ If the men were refusing to pay the adjudged sums, no matter how small, this may have been the only route for recovery, but it does beg the question of how much Fletcher depended upon payment of this level of tithe, and whether his livelihood was seriously threatened.

The Incidence of Penalties

Introduction

There are innumerable local records of sufferings of violence, pitiless behaviour, including insisting that elderly and ill defendants remain in prison, and taking every last piece of property in satisfaction of adjudged tithes and costs. For instance, Brownsword insisted that, during the course of the proceedings mentioned below, Robert Barrow, who was ill and upon whose behalf the arresting bailiff applied to Brownsword that *It might endanger the Man’s Health to take him away at that time*, received the response *Unless he would pay, he should go immediately to Gaol*.

The following indicates the range of severe legal penalties that were applied in the region.

Damages

The term ‘treble damages’ is only specifically mentioned in the Westmoreland and Cumberland records in five cases, but there are very many instances of extremely high penalties as compared to the value of the initial tithe claimed and where it is likely that this penalty had been imposed. For example, Reginald Holme, in 1684, incurred a penalty of two cows, a horse, a bridle, a steer, a mare, and a saddle worth £15 for an original tithe worth £4.13s.

It is apparent that many of the local examples were for recovery of a tithes that had been adjudged due by the courts, remained unpaid and were treated from then as a debt, and this contributes to the understanding of Helmholz’s query as to how many debt cases were likely to be founded on tithes, as discussed above.

⁸¹⁷ Besse (Sessions Trust 2000) 130.

Outlawry

Both the two instances in the North West mentioned above involved imprisonment and a writ of rebellion.

Sequestration

This was an indirect penalty. Eighteen proceedings brought in the Exchequer resulted in sequestration. Some of these were because Quakers refused to answer to the proceedings under oath. Besse states that sequestration resulted from a declaration of *non est invectus* (he is not to be found) although he says that this was obtained falsely in a number of instances and that Quakers became alert to the problem and tried to ensure that their whereabouts were known.⁸¹⁸ He records Thomas Preston's further tithe proceedings in 1685. Those named as being involved in this dispute were Richard Britton, George Barrow, John Gurnell, Miles Birkett and Jennet Dixon, who suffered sequestration due to an allegedly false return of *non est invectus*.⁸¹⁹

Imprisonment

This was a very significant outcome that Besse cites simply as evidence of suffering in itself. However, the process by which imprisonment arose merits consideration because it shows the intersection between ecclesiastical and secular law, as well as the actual legal processes whereby this came about.

The database lists approximately 137 local cases of imprisonments for withholding tithes. In 1678, three local Quakers were imprisoned in Fleet Street, London for withholding tithes. There were only a handful of appeals.⁸²⁰ Many local Quakers died in prison. Some were imprisoned for excessive periods. The impression given by Besse is that the length of imprisonment was at the behest, or survival, of the prosecutor. However, under ecclesiastical law, there was no means of securing release if the prisoner remained obdurate in his contumacy.

⁸¹⁸ Besse (Sessions Trust 2000) 28.

⁸¹⁹ Besse (Sessions Trust 2000) 329.

⁸²⁰ According to Besse (Sessions Trust 2000 and 2008) in 1674 and 1688 respectively. It is difficult to be confident about this figure because appeal cases in the Borthwick Institute catalogue are not categorised so as to identify Quakers.

Most imprisonments followed proceedings that had been brought in the ecclesiastical courts.⁸²¹ In cases of continuous refusal to succumb to a determination of payment of tithes, the two Henrician Tithe Acts provided that the ecclesiastical judge could issue a certificate to two JPs to imprison contumacious, excommunicated offenders without a writ de excommunicato capiendo. Cumbrian records show that this Act was commonly cited against Quakers in this locality.

Below is the (abbreviated) text of one of eight certificates contained in Fleming's papers.⁸²²

Joseph Craddock..., Doctor of Laws, Commissary to the Lord Bishop of Chester, in... the Archdeaconry of Richmond, To [His Majesties' Justices of the Peace] Daniel Fleming, and William Kirby Esq...

Whereas by an Act made in the twenty seventh year of the Reign of our late Sovereign Lord King Henry the Eighth... it is ...Provided that if the ordinary of the Diocese or his Commissary make Information and Request to two Justices of the Peace ...of the Contumacy or disobedience of any person...before him for non-payment of tythes that the said Justices shall attach ...the said person and Commit him... to Ward there to remain without Baile ... till he... find sufficient pursons to be bound by Recognizanse to the use (?) of our Sovereign Lord the King to give due obedience to the ... sentences of the Ecclesiastical Court wherein such suits dependeth. These are therefore to Inform you that George Benson ... Richard Walker ...and William Satterthwaite ... of the parish of Hawkshead in the County of Lancaster have been duly cited to appear before me to answer Richard Kirby Esq in a cause of tythes which they and Every of them have neglected to do and for such their ... contumacy and disobediences stand excommunicated. And to Request you to Attach or cause to be Attached to the said George Benson, Richard Walker and William Satterthwaite and proceed against them ... according to the said Statute –

⁸²¹ See Chapter Eight on excommunication.

⁸²² WDRY/4/4/1/10 [Cumbria archive, Kendal].

Given at Richmond under my hand and Seal of my Office the Sixth day of December Anno Regni Regis Caroli secundi ...1666.⁸²³

A similar warrant was issued in 1669 by John Wainright, following Archbishop Sterne's visitation, citing the defendants' failure to appear at the consistory court in Chester to answer to non-payment of tithes.

On 25th October 1671⁸²⁴ Brownsword requested Fleming, in his capacity as JP, to grant a warrant, in conjunction with JP Braithwaite, against those mentioned in his attached certificate:

I have nearly 200 familys (sic) in this Parish who refuse payment. I have only taken out those who are most in arrears and obstinate... He attached a draft warrant ...to order Mr Banks to draw warrants to your severall Constables or such officer as you know the law appoints to the attaching of them.

There seemed to be a question over how or from whom such warrants may be procured in cities or corporations, of which Kendal was one:

...now the Statute only mentioning Justices of the County as especially providing against withdrawing of tithes in ... cities ... If a tithe question...mayor... have no power of support we are helpless as to such as live in cities or corporations".

Fleming noted at the bottom: *not good for the major and Senior Aldermen but for 2 JP (1.2) of Yorkshire*. His view was that only county JPs could issue such warrants.

In December 1671, a warrant was issued by Thomas Craddock as surrogate to Fleming and Braithwaite, under the same Henrician Act, in respect of Brownsword's proceedings mentioned in Section 7 above.

Overall, the impression given by these instances is that of a readiness to deploy the available legal sanctions as far as they could be taken.

⁸²³ The warrant does not make clear who commenced the original proceedings, and neither does the entry in Besse (Sessions Trust 2000) regarding these individuals. Other similar warrants that were retained by Fleming did so.

⁸²⁴ WDRY Box 31/1 (Cumbria archive, Kendal).

8. Conclusion

Tithe law was inherently complex, tithe disputes could be heard in two jurisdictions, and be subject to boundary disputes between the two. Although the nature of tithe disputes shifts over time in response to social and economic change, the legal frameworks that existed to determine the amount of tithe or custom were based upon accepted rights to receive and duties to pay tithes. The general tag of persecution has tended to obscure exactly what was at issue. This can be seen more clearly by close examination of the legal processes. Through this, we can see that the true reason for Quakers' sufferings in relation to tithes was not persecution by laws specifically aimed at them as religious dissenters. Rather they were subject to established, if rarely used, penalties of tithe law that were designed to support entitlement to tithes.

By the mid-seventeenth century, ecclesiastical and secular law governed and enforced tithes as an expression of divine right and as an essential part of the economic and ecclesiastical governance of English agrarian society. It was a vital source of revenue for clerical and lay tithe-holders. It is clear from the fine definitions applied by canon law that the determination of the rights, the precise detail concerning the nature and classification of tithes, and the manner of payment were crucial to the respective prosperity of all parties.

Burn's observation,⁸²⁵ that the legislation of the Reformation was an instance of 'how far the law hath gone in favour of the church', in so far as the legislation ensured the extinguishment of such *modo* in favour of bolstering of the clergy's rights, cited above in relation to custom, is worth examining. It points to an issue of possible distinction which is evident in the experience of the operation of tithe law in the Restoration period. Hill,⁸²⁶ refers to the encroachment of the common law over ecclesiastical courts' territory in relation to tithes in particular, citing Sir Edward Coke and John Selden, who asserted the common law's authority for determining tithes. However, a superficial reading of histories tracing the

⁸²⁵ Burn (n691) 396.

⁸²⁶ Hill (n697) 128.

ultimate decline in the power and authority of the ecclesiastical courts over the centuries, which is attributed to the ascendancy of the common law and its courts, may conflate jurisdiction and the substance of the law.

The instances of the operation of the law in the discreet period under examination show the activity and power of the restored ecclesiastical courts in relation to tithes. This was facilitated by the Parliamentary legislation with which, it is clear, the clergy were familiar. Accordingly, Burn's statement, fits the situation that faced Quakers, and any other determined withholder of tithes. Further support for the proposition that the law did move 'in favour of the church' in the early modern period is, arguably, contained in the 1549 Act which has been discussed in Section 3.⁸²⁷

The thrust of this chapter leans towards the legal theorists' view that mid-seventeenth century tithe law was an expression of 'human positive law'.⁸²⁸

As Helmholtz explains, there was a view that tithes constituted 'a tax instituted by the positive law of the church.'⁸²⁹

Whether tithes could properly be described as a tax, is debatable, but the nature of enforcement experienced by Quakers indicates that tithes were, in reality, an unacknowledged tax, especially if one applies the attributes of a tax as identified by Professor Lewis.⁸³⁰ The reason that suits were brought against them was for recovery of money rather than divine obligation or danger to Quakers' souls. This is illustrated in the attitudes of the prosecutors and can be discerned from the evidence of intent; for example, the vicars Brownsword, who talks of impoverishment of the Parish, and Ambrose, who (as described in the Cartmel controversy in Section 6) was happy enough for the landowner Preston to

⁸²⁷ *ibid* 91, although Hill states that the long-term effect of this Act was 'disastrous for the church.'

⁸²⁸ The term used by John Selden in *The History of Tithes That is the Practice of Payment of Them, the Positive Laws Made for Them, The Opinions Touching the Right of Them: A Review of it also annexed which both confirms it and Directs the Use of it.* (Early English Books Online, EEBO Editions 1618) xiv.

⁸²⁹ Helmholtz (n689) 4.

⁸³⁰ I am relying here upon the defining characteristics provided by Professor Andrew Lewis who kindly shared his view and his article "When is a tax not a tax but a Tithe?" (n690).

recover money by the devious use of the Conventicles Act. This aim is also evident from the Tudor statutes cited above and the utilitarian nature of enforcement. The motivation for most lay impropiators was financial. When the civil war had reduced estates and income and those who had been royalists had suffered under Cromwell, tithes were a means by which they could both recover and increase income.

The clergy were directly engaged in the tithe proceedings against Quakers, and in the pursuance of sanctions and extreme penalties. Whilst the ecclesiastical courts had limited enforcement powers, in practice the clergy joined and collaborated with secular authority, especially JPs, for enforcement. This was also affected by the fact that Quakers were viewed by some as social radicals who would undermine church and the propertied.⁸³¹

The material in Section 7, that is derived from the database, is suggestive of periodic campaigns of tithe enforcement but it is difficult to draw firm conclusions. Although there were some distinctly vicious attitudes, of which Preston's was an extreme example, the implication that there was a vindictive element to recovery cannot necessarily be claimed to be the motivation in every instance. An impression of personal hostility is engendered through the familiarity of prosecutors or plaintiffs, whether lay or clerical, with the individual defendants, and within close communities although the vehemence with which proceedings were pursued against Quakers in relation to tithes clearly had much to do with recovering their income and related less clearly to animosity towards them on purely religious grounds. It also emerges from the data that clusters of Quakers in particular localities – especially the areas around Cartmel, Kendal and Grasmere – were repeat offenders in relation to withholding tithes, but this was part of a wider controversy.

However, whilst, historically, periodic tithe “strikes” tended to be localised and short-lived, the systematic opposition of Quakers to the payment of tithes appears to have been of a different order to previous disputes and one that

⁸³¹ Reay (778) 111.

neither the prevailing ecclesiastical nor secular law could accommodate. Neither canon law nor state legislation favoured or facilitated dissent from payment of tithes nor, once a determination of withholding tithes had been made, was there any control over the extremes of punishment for withholding tithes. The incidence of penalties in Section 7 provides local evidence of the exploitation of such extremes.

Further departures from strict adherence to legal procedures lay with the use of manor courts for tithe recovery and the tendency to brow beat Quakers within those proceedings. The sources in Section 6 show that Quakers challenged unlawful processes. The legal refinements of how the tenth should be delivered or assessed, or what custom endured, was not normally the issue for them. Of course, Quakers were on the back foot in relation to tithe law, because withholding tithes was against the law, as we saw in Section 3 where their counsel, Robert West, sagely advised them.

The Quakers exposed themselves to the penalties through their corporate commitment to non-payment and it seems to have been aligned to their willingness to be martyrs. This is indicated by Atkinson's tract cited in Section 4 and the testimonies in Section 5. They had placed themselves in the vanguard of opposition to tithes when abolition was advocated by several quarters and debated, under Cromwell, as a serious proposition. They adhered to their pre-Restoration commitment and, led by their conscience against tithes, persisted in withholding them. This time, they were perceived as dangerous, not, in terms of physically plotting against the established authorities, as was the case with regard to conventicles, but in undermining social and economic activity, and especially those whose power in the localities was being asserted – the clergy and the landed gentry. The Restoration, however, was no more inauspicious a time for Quakers opposition than at any other time until tithes were eventually abolished.

The next chapter will closely examine the particular penalty of excommunication as it was applied to Quakers. This especially, although not exclusively, followed non-payment of tithes.

Chapter Eight

EXCOMMUNICATION

1. General Introduction

Excommunication is a spiritual penalty that was imposed by ecclesiastical courts and framed by both canon and civil law. In Chapter Two we saw that the restored ecclesiastical courts resumed their power to excommunicate with effect from 1661. We also saw, in the preceding chapters, that excommunication could be imposed for a range of offences against ecclesiastical law that Quakers committed.

Section 2 of this chapter describes excommunication and outlines the prevailing law relating to the sanction. Section 3 considers the practice of excommunication in mid-seventeenth century England. For excommunicates, there were legal, social and economic consequences. The consequences could be severe and, in England, they included imprisonment, which receives particular attention. Fourthly, the chapter examines sources that illuminate the practice of excommunication locally to inform an analysis of the nature and purpose of excommunication *vis-a-vis* Quakers at this time.

2. The Nature of Excommunication

Introduction

*'Excommunication is an ecclesiastical censure, whereby the person against whom it is pronounced is for the time cast out of the communion of the church.'*⁸³²

Excommunication was canon law's 'most serious sanction'⁸³³ and it was described as *the eternal separation of death*.⁸³⁴ It was equivalent to *handing a*

⁸³² God 624, cited in Richard Burn, *The Ecclesiastical Law* (H Woodfall and W Strachan 1763) Excommunication, 201. See also John Godolphin *Repertorium canonicum, or, An abridgement of the ecclesiastical laws of this realm* (London 1678) 623-637 for further detail of excommunication, including case law.

*person over to the Devil.*⁸³⁵ It could be effectively imposed as a curse that was issued, *ex parte*, by virtue of spiritual power rather than, or as well as, a judicial sanction:

*'Amidst tolling of bells and dashing of candles, he was cursed and cut off from the Churches' body as a scandalising member, henceforth, treated as a pagan.'*⁸³⁶

The power of excommunication as an anathema was claimed to cause death or destruction. Roman canon law provided the legal means to bring about excommunication within both the Catholic Church as a whole and the Church of England.

There could be an *ipso facto* excommunication when a person was looked upon as excommunicated from the time of an offence. Helmholz reports that from the twelfth century, during the burgeoning of classical canon law, canon lawyers recognised the need for procedural safeguards⁸³⁷ and there evolved a 'distinction between a purely spiritual excommunication and excommunication enforced by statute and the civil law.'⁸³⁸ Consequently, the 'difference between judicial and automatic excommunication was considerably narrowed in English practice.'⁸³⁹ This took effect in the form of citing the excommunication by means of a warning rather than encouraging 'automatic' excommunication.

By, at least, the late medieval period, there had to be due legal process before an *ipso facto* excommunication could be relied upon. If the fact was not notorious, it must be proved by proctor's petition to the ecclesiastical judge and the offender had to be duly committed in law⁸⁴⁰ before the ordinary prior to excommunication in the ecclesiastical courts taking place. For instance, by the

⁸³³ R H Helmholz, *Excommunication as a legal sanction, the attitude of the Medieval Canonists*, (1982) 68 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Kanonistische Abteilung* 202-218.

⁸³⁴ *Glossa Ordinaria ad Extravagantes Johannis XXII: 14.5 (Quia quorundum) s.v. excludere debet a regno*, quoted in Helmholz, *ibid* 205.

⁸³⁵ Richard M Helmholz, quoting Gratian's *Decretum C.11 q 3 c 21*. in 'Excommunication in Twelfth Century England' [1994-1995] 11 *Journal of Law and Religion* 235-253.

⁸³⁶ F Donald Logan *Excommunication and the secular arm in medieval England: a study in legal procedure from the thirteenth to the sixteenth century* (Toronto: Pontifical Institute of Medieval Studies 1968) 263-265 (citing Julius Goebel, *Felony and Misdemeanour* (Columbia University Press 1937)).

⁸³⁷ Helmholz (n835) 236.

⁸³⁸ Robert Phillimore, *The Ecclesiastical Law of the Church of England, Vol. 11* (Sweet and Maxwell 1895) 1087.

⁸³⁹ Helmholz (n835) 252.

⁸⁴⁰ H Consett, *The practice of the spiritual or ecclesiastical courts* (London 1685) 36-37.

Brawling Act 1551,⁸⁴¹ in relation to violence in church (an ipso facto excommunication), alleged offenders were warned of the proposed offence and penalty and summoned to show cause at a hearing as to why they should not be declared excommunicate.

The ordinance of William the Conqueror 1072 separated ecclesiastical courts from the hundred courts and, according to Logan,⁸⁴² instigated a process designed to establish church discipline under its own laws and procedures. To ensure respect for ecclesiastical authority, the ordinance provided that if those cited refused to attend ecclesiastical courts after three citations, they could be excommunicated. If necessary, this could be by employing the King's sheriff.⁸⁴³ This set the English procedure that endured into the seventeenth century. The equivalence of the hundred courts with the ecclesiastical courts implies that the issue concerned jurisdiction for excommunication at a low, local level, rather than as a grand process. This is an important context for the understanding of the imposition of the sanction, as will be seen.

Canon lawyers distinguished between wilful contumacy and 'simple' commission of an ecclesiastical offence in relation to excommunication. There were two categories of spiritual excommunication:

- i. 'Lesser', or minor, excommunication was passed by ecclesiastical judges on persons guilty of obstinacy and disobedience to the then established process in not appearing on a citation, or not submitting to penance or other court injunctions.⁸⁴⁴ Thus, if a defendant did not attend in response to a summons he could be declared contumacious and suspended from church. If this continued for 40 days he could be excommunicated. He was thereby excluded from sacraments and divine worship.

⁸⁴¹ 5 and 6 Edw VI c.4 s.2.

⁸⁴² Logan (n836) 17.

⁸⁴³ Logan (n836) 18. Godolphin (n 832) 623 - 637 and Consett (n 840) 35-49 both make clear ecclesiastical law's emphasis upon ensuring adherence through excommunication.

⁸⁴⁴ Phillimore (n838).

ii. Greater, or major, excommunication excluded a Christian *from Communion of the Church in sacred rights and privileges, and from the Company of the Faithful, so that 'tis Excommunication to keep Company with them.*⁸⁴⁵ If a judge said 'I excommunicate such a person' generally (which seems to mean publishing it) this would constitute greater excommunication.⁸⁴⁶

Logan⁸⁴⁷ says that major excommunication did not exclude anathema, but that judicial, rather than ritualistic aspects were required in that the sentence of anathema involved an additional solemn imposition by a bishop and twelve priests. The fine, and probably inadequately understood, distinction between anathema and greater excommunication, and, more particularly, between greater and lesser excommunication, may be one reason why there is a misconception about the attitude towards, and effect of excommunication upon, dissenters. This will be explored in more detail below.

Excommunication could be caused by many transgressions. These included serious matters such as heresy, simony, usury, incest and adultery. It covered practicing midwifery without a licence from the church authorities. It was extended in the late 1550s to piracy, conspiracy against the government, wilful murder, sacrilege and bearing false witness.⁸⁴⁸ It was also, crucially so far as Quakers were concerned, imposed for offences against the pecuniary interests of the Church of England such as non-payment of church repairs, clergy wages, for failure to attend church under the Popish Recusants Act 1605 and for non-payment of tithes, as we saw in earlier chapters.

⁸⁴⁵ Lindwood 266 (cited in Burn (n832))202.

⁸⁴⁶ Lindwood (cited in Burn (n832))201.

⁸⁴⁷ Logan (n836) 14.

⁸⁴⁸ Christopher Hill, *Liberty Against the Law, Some Seventeenth Century Controversies* (Penguin Press 1996)195.

Excommunication was effective in the diocese in which the sentence was passed but it did not take effect at common law until it was decreed as a sealed instrument and published by the curate where the offender lived.⁸⁴⁹

Canon law provided that strangers were not to be permitted to communion without a letter of recommendation because it was an ecclesiastical offence (itself amenable to excommunication) to receive an excommunicant into church.⁸⁵⁰ Canon 85 required churchwarden *shall see...that all persons excommunicated and so denounced be kept out of the church.*⁸⁵¹

Excommunicants should be publicly denounced in church during Sunday service every 6 months under Canon 65:

All ordinaries shall in their several jurisdictions, carefully see and give order...that those...who for notorious contumacy, or other notable crimes, stand lawfully excommunicate, unless within three months after the sentence be pronounced against them, they reform themselves and obtain the benefit of absolution, be every six months ensuing... in the parish church as in the cathedral church of the dioceses in which they remain, by the minister openly in time of divine service, upon some Sunday, denounced and declared excommunicate, that others may be thereby both admonished to refrain their company and society, and excited ... rather to procure out a writ De Excommunicato Capiendo, thereby to bring and reduce them to due order and obedience....

The writ de excommunicato capiendo is discussed below. First, it is important to note that excommunication was associated with a range of social and legal disabilities, these included: ostracism; as well as prohibiting or impeding ability to: trade; pursue a debt (where the excommunication was pleaded and certified); make a will (if excommunicated for heresy or usury); sue for a legacy in ecclesiastical courts; serve as a guardian; be buried in churchyards; or give evidence in court in certain proceedings. As is indicated by the qualifications

⁸⁴⁹ Philimore (n838) 1087.

⁸⁵⁰ Phillimore (n838) 1088.

⁸⁵¹ Phillimore (n838) 1088.

attached to some of the above, the precise scope of and effect of an excommunication depended upon variable factors, such as the nature of the offence, whether it was lesser or greater excommunication, and the stages in the procedure, which would inevitably give rise to legal dispute. There were also doubts as to whether the sentence affected marriage and executorship.⁸⁵² As such, excommunication impacted upon civil rights both inside and outside ecclesiastical jurisdiction.

Canon lawyers designed exceptions on compassionate grounds: for example, it could be lifted if it was having a detrimental effect, such as in relation to someone too poor to pay, or the instant absolution of a dying man.⁸⁵³

Absolution

By virtue of its reconciliatory and ‘medicinal’,⁸⁵⁴ (as opposed to punitive) purpose, excommunication was not regarded by canon lawyers as, in itself, a final determination.⁸⁵⁵ It was not intended as a permanent state, but one that was amenable to cure, which the offender him or herself was responsible for curing: *that they may recover themselves out of the Snare of the Divel*.⁸⁵⁶ Excommunication was intended to bring the offender to his or her spiritual senses and could be ‘cured’ by their submission to the ecclesiastical court’s demand. Absolution could be obtained by immediate compliance or by putting a caution of intent to comply to the bishop.⁸⁵⁷ The bishop could not refuse this and it could be enforced by a mandamus from the King’s Bench. The intent could be proved by real security such as a mortgage, or by a corporal oath.⁸⁵⁸

There does not appear to have been a set timescale for absolution to take effect. It is uncertain, although unlikely, whether an excommunication could lapse over

⁸⁵² Case studies below illustrate some issues that concerned Quakers.

⁸⁵³ Helmholz (n833) 208.

⁸⁵⁴ Hostensis, *Lectura as X 5.29.40* cited in Helmholz (n833) 207.

⁸⁵⁵ Helmholz (n833) 204.

⁸⁵⁶ 2 Tim 2 26, quoted in Anon *The Case and Cure of Persons Excommunicated according to the present Law of England Ch.1V* (London, 1682) 15126 Tract 7 (Quaker Archive).

⁸⁵⁷ Burn (n832) 215.

⁸⁵⁸ Gibbs 1063 (cited by Burn (n832) 215).

time. As discussed below, large numbers of Quakers were habitual or longstanding excommunicates. Continued refusal to submit, was deemed to be contumacy after forty days and could result in severe penalties. However, it is not clear that the church authorities pursued all excommunications by this means. This may relate back to whether the offence fell within the category of greater or lesser excommunication. It may also have depended upon the appetite of the prosecutor to further pursue it as well as administrative capacity. Spurr says that weak ecclesiastical administration in the Restoration period combined with the numbers involved meant that few knew who were excommunicated.⁸⁵⁹

Appeals and Procedural Safeguards

Canon lawyers held that an unjust sentence of excommunication was not a nullity. The sentence remained, once imposed, unless it was absolved by the excommunicant. This was intended to uphold the authority of the church courts as well as recognising that, whilst the limitations of proofs of evidence or judges' fallibility might mean that mistakes were made, earthly excommunication was ultimately subject to reversal by God.⁸⁶⁰ This derives from the spiritual nature upon which the penalty was predicated: an incorrect excommunication was an unfortunate consequence of the temporal application of the law. The absolution *ad cautelam* (bail) procedure 'maintained the theoretical force of excommunication whilst protecting the litigant's right to a full and fair hearing.'⁸⁶¹ This was applicable when an appeal was made.

The tract *Concerning EXCOMMUNICATION*⁸⁶² refers to

Old law – tenderness of forefathers for liberty of subject. If a man is unduly imprisoned, he may relieve himself by 1. Action on Magna Carta, 2. Writ de Odio and Ataia 3. Writ di Homine Replegiando, 4. Writ of HABEUS CORPUS, Supercedeas, Prohibition etc... But because persons imprisoned at the Church's

⁸⁵⁹ John Spurr, *The Restoration of the Church of England, 1646-1689* (Yale University Press 1991) 216.

⁸⁶⁰ Helmholz (n833) 209.

⁸⁶¹ Helmholz (n833) 207.

⁸⁶² Anon, *A DISCOURSE Concerning EXCOMMUNICATION as Executed by Officials. And concerning the Common Law Writes de excommunicato capiendo and De Cautione admitte; For the punishment of persons Excommunicated, and their Deliverance from the punishment* (London 1680) 6/24/15325 (Quaker Archive).

desire were not bailable, there was a particular writ devised for their relief _ sending to the Bishop a Caution for their due obedience by 1. Bond, 2. Pledge, 3. Oath. If the Bishop refused to take the caution, the law provided a writ to command him to.

The author cites an entry in the Register of Writs of 1634 p.66. He says:

Lord Chancellor Hide turned this into a discretionary Writ, dependant on a petition to lord chancellors or lord Keepers. Bishops often refuse to obey these

A person who appealed timeously against a sentence of excommunication should suffer no prejudice.⁸⁶³ Burn advised that an appellant against a writ de excommunicato capiendo was put into the same state as before the excommunication and the Lord Chancellor could provide a *supersedeas* over the writ de excommunicato capiendo. However, it should be noted that canon law required appeals to pass through the hierarchy of courts as we saw in Chapter Two.

In arguable cases, a *sciare facias* warned the bishop of the party prosecuting to show cause why an excommunicated prisoner should not be freed. Alternatively, if a sheriff delivered an offender without a legal order, a bishop could complain in Chancery proceedings to obtain a writ *ex recipiendo* for a coroner (another use of secular authority) to apprehend the excommunicate and require the sheriff to appear and answer to contempt.

The medieval practice that permitted certification of excommunication by any church official was curtailed in Edward VI's reign by Archbishop Cranmer. An aspect of this was the notion that bishops had sufficient standing to certify contumacious excommunication which may involve the secular authorities whereas those 'inferior to bishops cannot call in the secular arm.'⁸⁶⁴

⁸⁶³ Panormitanus, *Commentaria* ad X 5.39.48 (Sacro aprobante) nos.2-10 (fols.194v-195) Cited by Helmholz (n833) 206, footnote 17. See Consett (n840) 191 for the designated timing of the four stages in an appeal against excommunication.

⁸⁶⁴ Phillimore (n838)1089.

By the time Coke wrote his Institutes, only a bishop, or, as specifically provided locally, the archdeacon of Richmond, could certify excommunication.⁸⁶⁵ However, this did not restrict its imposition to bishops personally.

*...When Bishops claimed sole power for excommunication and charged themselves with so many Churches a thousand eyes (though very watchful) could not possible oversee, the power of excommunication...came into the hands of Laicles under the notion of officials.*⁸⁶⁶

The laity was empowered to act as ecclesiastical judges, as described in Chapter Two.

In addition to canon law's procedural safeguards, the secular courts could issue prohibitions and, in the event of committal to prison, secular procedure required that the mittimus, or warrant for committal, contained full and correct information regarding the prisoner and the offence. A procedure for contesting excommunication was therefore, theoretically available, but it was expensive, cumbersome, and required legal knowledge. This may have added an ecclesiastical version of what is now dubbed 'satellite litigation.' The labyrinthine character of ecclesiastical litigation persisted in the restored ecclesiastical courts following the Restoration. A detailed example is provided in the case studies below.

Signification and the Writ de Excommunicato Capiendo

Beyond exclusion from the church, there was a further penalty attached to greater excommunication: imprisonment. Ecclesiastical courts could not commit offenders to prison but there was a set procedure which this section describes.

The process first required the issue of a significat (certificate of offence) from the bishop who had granted the letters of excommunication, and was the route to a writ of excommunicado capiendo, whereby civil magistrates could commit an excommunicant to prison. In order to be valid, the exact reason for the excommunication and the fact of contumacy was contained in the certificate. The certificate was then sent to Chancery where a writ de excommunicato de

⁸⁶⁵ Coke, *Institutes*, Vol 1 134 (cited in Phillimore (n838))1089.

⁸⁶⁶ *The Cause and Cure of Excommunication* (n856).

capiendo could be purchased commanding the sheriff to imprison the excommunicate until the contempt was purged. If a bishop incorrectly issued a certificate of excommunication, he could be made a party and liable to pay costs.⁸⁶⁷

The local studies show that significats were commonly issued in the period in question. This was despite Helmholz' view that they were 'a disruptive, extreme remedy, not normally consistent with the restorative goals of the canon law.'⁸⁶⁸

Logan found that, after 1600, significats were only found in the then Public Record Office from Hereford and Chester.⁸⁶⁹ The exact reason for this is not known but it is noteworthy for this study because Chester was one of the North Western dioceses.

Lawyers disagreed as to whether the writ de excommunicato capiendo was issuable only by the King's grant or a right in itself which the King could not deny.⁸⁷⁰ From the fourth century onwards, the church had insisted that it was the general duty of temporal rulers to support the church for the good of society.⁸⁷¹ The fact that, after the Reformation, papal authority was no longer recognised in England, did not mean that the legislature did not support the English ecclesiastical authorities. The use of the writ de excommunicato capiendum was, according to the Dean of Arches under Queen Elizabeth's reign, Dr Cosins, peculiarly English.⁸⁷² It was in use during the medieval period, but by the early modern period it was regulated by the Writ de Excommunicato Capiendo Act 1563.⁸⁷³ The preamble to this Act shows the readiness of civil law and secular legislators to further the reach and effectiveness of ecclesiastical law.

⁸⁶⁷ This principle was established by case law during the late seventeenth century: *R v Eyre* 2 Strange 1189, a 1740 case but based upon *Hocking v. Matthews* 1670 (Phillimore (n838)) 1090.

⁸⁶⁸ Helmholz (n833) 217.

⁸⁶⁹ Logan (n836) 156-157.

⁸⁷⁰ Coke, *Institutes*, Vol. 2 631, and Lindwood 351 (cited in Phillimore (n838)) 1090.

⁸⁷¹ Logan (n836).

⁸⁷² Cosins *Apology for Some Proceedings in Causes Ecclesiastical* (quoted in Phillimore (n838)) 1091.

⁸⁷³ 5 Eliz I c.23.

Consequently, in relation to excommunication, the temporal law was employed to coerce repentance.⁸⁷⁴

The Elizabethan Act recites the problem of incorrect execution of the writ by lesser officials so that it was invalid and allowed offenders to *continue their sinful and criminous life, much to the displeasure of Almighty God and to the great contempt of the ecclesiastical laws of this realm*. It then sets out a scheme for the issuing of the writ.

By section I it was to be issued in the Chancery Court, returnable after twenty days during the term time of the court of King's Bench, then sealed and opened by the justices and delivered of record to the county sheriff.

Section II provided that the sheriff must first declare how the writ had been served before he could deliver the individual excommunicant. If the return was *non est inventus*, after a set period, a proclamation and a fresh writ could be issued.

Section VI sets out the special procedure to be adopted in regions outside the Crown's direct jurisdiction, including the County Palatine of Lancaster and Chester, where, a mittimus must be also be sent to the Chancellor of the County Palatine. (This was not always followed in practice.)

The authority that was given to justices of the peace to commit excommunicants to prison in order to secure obedience to the ecclesiastical courts in relation to tithes under Henry VIII,⁸⁷⁵ was expanded to all ecclesiastical proceedings by the Writ de Excommunicato Capiendo Act 1563. This Act also provided that, where a sheriff returned *non est inventus* to the Chancery writs, a *capias* should be issued immediately which allowed recourse to the King's Bench and sessions of the peace to be sought at the same time. This is pertinent to the Quakers' experience as shown below.

⁸⁷⁴ Logan (n836).

⁸⁷⁵ This is discussed more specifically in the Tithe chapter.

Till⁸⁷⁶ found that, upon the restoration of ecclesiastical court jurisdiction, in the Northern province, the first sentence of excommunication in York was not made public. At this point in time, there was no clear authority to issue the sentence. In the Hilary Term 1661/2 excommunication was issued upon a defendant's second failure to appear when called. By 20th March 1662 the sentence of excommunication was pronounced when the defendant failed to appear in the first call. 'Thereafter more than half the cases in the consistory court proceeded to a sentence of excommunication at their 1st hearing.'⁸⁷⁷ The first significant from York was issued on 9th October 1662.

Till regards this as a significant indication of the weakness of the spiritual jurisdiction.⁸⁷⁸ By this he meant that 'Excommunication was the main weapon of coercion, pronounced by the chancellor or his lay surrogate for any offence however trifling, and most often for contumacy,'⁸⁷⁹ and the system was 'generally unworthy of the solemn nature of the proceedings and of the language ...invoking the aid of the Holy spirit – in which their formal records were couched'.

Chester diocesan records⁸⁸⁰ hold 64 'short form' excommunication records from the year 1663, when there were several excommunications a month and a small number from 1662 when, presumably, jurisdiction for excommunication was restored. John Wainwright's authority as Chancellor is recorded, with the signatures of the clerks, Wilson and Thompson. These were possibly by parish but it is difficult to do more than note the fact of them because the whole batch is badly damaged.⁸⁸¹ Many names are obscured, but on several records a number of names are given together which seems to indicate a group of people having been

⁸⁷⁶ B D Till, *The Administrative System of the Ecclesiastical Courts in the Diocese and Province of York. Part III. 1660-1883. A Study in Decline* (Unpublished manuscript, Borthwick Institute, York 1963).

⁸⁷⁷ *ibid* 11-12.

⁸⁷⁸ Till (n876) 11-12.

⁸⁷⁹ Till (n876) 12.

⁸⁸⁰ EDC 6/12/1-4 (Chester Archive). The figure includes all excommunications ie it is not confined to Quakers.

⁸⁸¹ I am grateful to the Chester archivists for allowing me to view them.

excommunicated at the same time. There are no further excommunication records for Chester until the early eighteenth century.⁸⁸²

Through his study of English records of significations between the thirteenth century and the Reformation, Logan deduced that the English procedure was highly formalised and institutionalised.⁸⁸³ This is borne out by physical examination of later records of excommunication in the Chester archive which reveals that there was a standardised format. The records were sealed, hole punched and strung together with a simple account of the name and misdemeanour and a formulaic statement of excommunication: *For their manifest contempt of the law and the ecclesiastical jurisdiction.... this Excommunication was duly published in the Parish Church of ... within mentioned according to the tenor and effect thereof by me...* By 1713 this citation was in printed form.⁸⁸⁴ They illustrate the common use of excommunication as a sanction against transgressions of ecclesiastical law. In particular, as data for the North West shows, excommunication was frequently imposed in relation to pecuniary offences.

Significats for the Chester diocese, including North Lancashire, are held, in loose bundles, in the National Archive. Cumberland, North Yorkshire and Westmoreland came within the Diocese of Richmond and these records are harder to track down but appear to have been split between Preston and Leeds archive offices, according to whether they were in the Western or Eastern part of the archdeaconry. Ten significats are noted in Besse: two in 1671, one in 1675, one in 1676, three in 1682 and three in 1685. All are said to be for tithes (save 1675 and 1685 where no reason is given.) This does not correspond with the number of writs that he cites and so the number of significats that he records is probably inaccurate overall.

⁸⁸² This is unlikely to be because there were no more excommunications, especially since there are significats following excommunications in the TNA for later dates (unless those significats were only connected to the 1662/1663 excommunication.) Nor is it likely that there was a sudden change of practice on excommunication in the Chester dioceses. The more likely explanation is that they have been damaged or lost.

⁸⁸³ Logan (n836) 24.

⁸⁸⁴ EDC/6/2/2 (Chester Archive).

Between 1662 and 1685, one hundred and twenty-one significats retained in The National Archive (TNA) were certified by John Wainwright: thirty-eight between 1662 and 1665⁸⁸⁵; fifty-one between 1679 and 1680;⁸⁸⁶ and twelve between 1680 and 1683.⁸⁸⁷ They are written in Latin, the names were also translated into Latin, and they followed a standard formula: Salutation to the King from Wainwright, the name of the excommunicant, their residence and parish, a recital of the offence for excommunication and statement of contumacy. This was a point taken up by Quakers on the occasions that they challenged a significat. Horle cites an example where a bishop swore a *significavit* which failed to list one of the causes or offenses as required by 5 Eliz I c.23. The significats were signed by the then registrar, Gabriel Wilson, sealed and endorsed on the back. The significats in this collection in TNA refer to all members of the community. It is not clear if any of them are Quakers. Many of the transgressions that were certified in the TNA records were matrimonial. Quakers were not generally known to commit ecclesiastical matrimonial offenses. Nonetheless, one hundred and twenty-one is quite a high number of significats affecting the population as a whole, particularly as the cost of the signification procedure was £4 10s.⁸⁸⁸

This section has considered the use of significats and the writ de excommunicato capiendo in some detail. This was prompted by the number of such cases recorded in Besse (of which there are further details in Section 4 below) as compared to the theory that this was an extreme and harshly used procedure. As will be seen in the following section, there were contemporary concerns about the issue.

⁸⁸⁵ CHES/38/26/4 (The National Archive (TNA)).

⁸⁸⁶ CHES/38/25/5 TNA.

⁸⁸⁷ CHES/38/25/6 TNA.

⁸⁸⁸ Till (n876) ch V.

3. The Imposition of Excommunication in the Seventeenth Century

Introduction

Helmholz writes, of the medieval period, 'in the years to come there were complaints about the use of the church's great sanction of excommunication and its use for trivial, secular or illegitimate ends.'⁸⁸⁹ He notes that effective procedural requirements did not completely eradicate excommunication for trivial matters.⁸⁹⁰ Under Archbishop Laud the range of excommunication expanded. The church also imposed fees on the excommunicated who could be absolved and have their legal rights restored, if they paid them.

There is a general impression that, by the seventeenth century, neither dissenters nor the public at large were concerned about the issue. Horle says:

'Threat of excommunication did not seem to scare many Dissenters because the number of excommunications was immense...Derbyshire Friends stopped recording excommunicates after 1663'⁸⁹¹, 'the same is probably true for other counties.'⁸⁹²

Whilst it may have been the case that excommunication did not necessarily impart spiritual terror, I suggest that the implication that excommunication did not matter arises from a misconception as to the legal consequences of excommunication. As described above, there was lesser and greater excommunication and it is likely that many 'routine' excommunications were of the former category.

Burn⁸⁹³ echoes contemporary concerns by posing a pupil's question and the answer thereto:

⁸⁸⁹ Helmholz (n835) 250.

⁸⁹⁰ Helmholz (n835) 250.

⁸⁹¹ Citing Helen Forde: *Derbyshire Quakers, 1650-1761* (PhD Thesis, Leicester University 1977).

⁸⁹² Craig Horle, *Quakers and the English Legal System, 1660-1685* (University of Pennsylvania Press 1988) 231.

⁸⁹³ Burn (n832) 403-404.

Q. *Is not the frequent use of Excommunication for not appearing or disobeying of sentences, though in the smallest of matters, and those oft times of a civil nature, one principal means of bringing it into contempt?*

A. *Yes, but this is the only way that the spiritual court has to enforce obedience.*

Several seventeenth-century tracts criticise the way in which excommunication was used. The anonymous, and, putatively, legally authoritative tract entitled '*The Case and Cure of Persons Excommunicated according to the present Law of England*'⁸⁹⁴ has two parts, the first dealing with the historical and legal basis of excommunication and the second with means of challenging it:

The Mischievous Consequent of Excommunication as the Law stands at present in England. With some Friendly Advice to Persons Pursued in Inferior Ecclesiastical Courts by Malicious Promoters; both in order to their avoiding Excommunication, or delivering themselves from Prisons, if imprisoned because they have stood Excommunicated Fourty days...to restrain the abuse of this Censure, and to deliver the Subjects from the Oppression of it.

The requirement for procedural form described above became an important feature for those seeking to object to having to answer to being excommunicated. Legal advice on challenging the process included taking care to check that transcribed depositions accurately reflected their account, the exact date and time of a summons was put to them, that at least two witnesses attested to the service, publication of the excommunication and so forth. An example of this procedure in practice is provided in the extract concerning depositions below.

Case and Cure evidences contemporary concerns around the use and abuse of excommunication *so commonly thundered out*.⁸⁹⁵ The author's view was that people were not fully aware of all the legal consequences of excommunication and states that excommunications were commonly viewed as a form of civil punishment rather than the *Solemn Institutions of God* and, since they held no

⁸⁹⁴ *The Case and Cure of Persons Excommunicated* (n856).

⁸⁹⁵ *The Case and Cure* (n856) 29.

spiritual dread, they were not taken seriously.⁸⁹⁶ This is surprising in an era in which people had a very strong sense of religious identity. This fulfils Helmholz' comment that there were concerns 'that the Church's legal system had lost its connection with the spiritual purposes that had called it into being'.⁸⁹⁷ Helmholz describes the *status quo ante* so far as the Restoration period is concerned but, it is contended here that the said concerns presage some abuses of the ultimate penalty during the Restoration.

A satirical tract⁸⁹⁸ comprising a dialogue between a doctor of both laws, and a burgher illustrates this.

Dr: And did it not strangely affect you? Did you not find some secret blasting upon you by it?

Burg: I had been filled with superstitious fears from my infancy, that Excommunication was a terrible weapon...therefore, when I was sentenced, I had some horror come upon me... the next morning I looked upon my wrists to see if the Plague-tokens did not appear; if my head did not but a little ache, I presently thought that the Excommunication began to put forth its mortal operation; but after a while, I found myself to eat and drink as heartily, to sleep as soundly as if I had been laid in the bottom of the Church.

Spurr⁸⁹⁹ notes that, in March 1668, the House of Commons considered reforming the church courts in connection with dissenters. Clerics themselves appear to have recognised how far the use of excommunication had gone. There was a clerical campaign that excommunication be restricted to serious spiritual offences. Archbishop Sheldon and Sir Leoline Jenkins considered introducing a statutory offence of contumacy but did not do so for fear that this would

⁸⁹⁶ The Case and Cure (n856) 29.

⁸⁹⁷ Helmholz (n835) 253.

⁸⁹⁸ Anon, *EXCOMMUNICATION EXCOMMUNICATED: OR LEGAL EVIDENCE That the Ecclesiastical Courts Have no Power to Excommunicate any person whatsoever for not coming to his PARISH-CHURCH in a DIALOGUE BETWEEN A DOCTOR of both LAWS, AND A Substantial Burgher of TAUNTON-DEAN* (LONDON 1680) Tracts 575/30 (Quaker Archive).

⁸⁹⁹ Spurr (n859) 218.

effectively acknowledge 'that the penalties and even the authority of the church courts were derived from the state.'⁹⁰⁰

Excommunication as a Political Tactic

A most blatant disconnection from the spiritual nature of excommunication appeared in the short term, but strategic, use of excommunication to disbar dissenters as voters.

Dissent in this context was not confined to separatists from the Church of England, such as Quakers and Anabaptists. A substantial number of moderate dissenters were Members of Parliament. Lacey says that their political effectiveness depended on the support they gave to sympathetic Anglican political candidates.⁹⁰¹ 'Most Restoration dissenters turned to parliamentary politics to limit and control the actions of the King. Many thought that basic individual rights should be governed by fundamental constitutional law.'⁹⁰² On the other hand, Anglican Tories in church and state wished to prevent dissenters gaining control of parliamentary representation.⁹⁰³

Dissenters who were convicted of recusancy were subject to excommunication if they did not attend church under 3 Jac c.5 s.IX.

At least two contemporary, anonymous tracts refer to the use of excommunication in this context. The *Dialogue* cited above:⁹⁰⁴

Burg: Last night, a vexatious Paritor,⁹⁰⁵ one that plies hereabouts continually, snapt me with a Summons to appear by Ten of the Clock this morning at the Bishops Court...if I appear not, they have the advantage, and excommunicate me upon a contempt: If I do appear, tis ten to one they have

⁹⁰⁰ Spurr (n859) 218.

⁹⁰¹ Douglas R. Lacey, *Dissent and Parliamentary Politics in England, 1661-1689, A Study in the perpetuation and tempering of Parliamentarianism* (Rutgers University Press 1969).

⁹⁰² Ibid xiii.

⁹⁰³ Gibson, William 'The Limits of the Confessional State: Electoral Religion in the Reign of Charles II' [2008] 51 *The Historical Journal* 27-47.

⁹⁰⁴ Excommunication Excommunicated (n898).

⁹⁰⁵ Apparitor – see Chapter Two.

no libel ready, and then I must appear the next Court-day, and so on until some journey, sickness or other indispensable occasion makes me absent, and then be sure I am delivered to the Devil... There's a special and extraordinary reason for't at this time: For this Excommunication ...incapacitates a Freeholder from having a voice in the Election of Members to serve in Parliament.

Lacey ⁹⁰⁶ thought that excommunication had not generally been used to deprive dissenters of the vote until after the Oxford Parliament of 1681. Gibson considered its use to have been more widespread, albeit for the brief period of 1678–1683. ⁹⁰⁷ He also found the earliest use of excommunication for electoral purposes in 1669 in Bridgewater, Somerset,⁹⁰⁸ citing the Journal of the House of Commons IX, 7 Dec. 1669 ⁹⁰⁹ disqualifying a number of dissenters. 'Between 1675 and 1678, there were seven by-elections in which the excommunication of dissenters led to an election defeat.'⁹¹⁰ There were two general elections in the period from 1678 to 1681.

Lacey ⁹¹¹ reports that lawyers differed sharply as to whether excommunication would render a man incapable of voting, but it was used as a ploy to deny them votes. There does not appear to be any direct authority for so depriving them, nor, given the spiritual nature of the penalty, would one expect there to be. Stote, the sheriff of Berwick told Danby '*We found that many of them stood excommunicated for not repairing to divine service and not receiving the sacrament, and we did except against their votes as not legal.*'⁹¹² Reference was made to legal authorities such as Bracton that 'an excommunicated person could not do any legal act'.⁹¹³ Stote '*admitted that the tactic was a game.*'⁹¹⁴ The tactic extended to excommunicating electoral candidates.⁹¹⁵

⁹⁰⁶ Lacey (n901) 311.

⁹⁰⁷ Gibson (n903) 28.

⁹⁰⁸ a borough then dominated by dissenters.

⁹⁰⁹ Gibson (n903) 34 and footnote 37.

⁹¹⁰ Gibson (n903) 35 quoting Lacey (n901) 111.

⁹¹¹ Lacey (n901) 111.

⁹¹² Quoted in Lacey (n901) 111.

⁹¹³ Lacey (n901) 311.

The second tract, from 1678, includes concerns about the abuse of excommunication:⁹¹⁶

to keep their worthy Patriots from being chosen to represent their Countreys in your Honourable Assemblies ...A practice which (if not timely by your Honours taken notice of, and restrained) will give the Monopoly of Suffrages into the hands of Registers, Officials and Proctors.

It adds: *a person excommunicated cannot (some say) give his suffrage in any Election...but this is an idle dream, so long as he hath a freehold of 40s a year.*⁹¹⁷

Gibson observes that the issue was 'occluded' and cites queries about the scope and legality of such actions.⁹¹⁸ There was certainly unease within the authorities about this and it would appear that, in the absence of legislation to this end, there was no natural legal basis for barring excommunicates from voting.

Lacey's focus was not upon the use of excommunication per se but the then serious political issue of dissent and parliamentary politics. Gibson says that 'the Corporation Act 1661 was used in boroughs where the parliamentary franchise rested with the corporations in order to exclude dissenters who could not qualify for a place on the corporation except by taking the sacrament in the Church of England.'⁹¹⁹ The excommunicated could not take the sacrament and therefore, it was argued they could not be part of a corporation. In an about turn from his 1672 Declaration of Indulgence, Charles II issued instructions to mayors and magistrates in boroughs to prosecute dissenters.⁹²⁰ The Test Act 1673 also indicated 'Parliament's unwillingness to consider dissenters as legitimately

⁹¹⁴ Gibson (n903) 39.

⁹¹⁵ Gibson (n903) 39.

⁹¹⁶ Anon, *A DISCOURSE Concerning EXCOMMUNICATION as Executed by Officials. And concerning the Common Law Writes de excommunicato capiendo and De Cautione admitted; For the punishment of persons Excommunicated, and their Deliverance from the punishment.* (London 1680) 6/24/15325 (Quaker Archive).

⁹¹⁷ In England, in this period, property rights were not contingent upon religion. J. Spurr *England in the 1670s: this masquerading age* (Oxford 2000) 237 quoted in Gibson (n903) 47 fn113.

⁹¹⁸ Gibson (n903) 35.

⁹¹⁹ Gibson (n903) 33.

⁹²⁰ Mary Anne Everett Green and Others, *Calendar of State Papers, Domestic, Charles II* (London: Longman, Green, Longman and Roberts 1860-1939).

qualified to exercise public office.’⁹²¹ As a result, dissenters sought parliamentary influence. Quakers notably did so from the mid-1670s. Certain bishops also sounded against voting for and by dissenters. The involvement of bishops in such political issues highlights their persistent assertion of political authority. The expedient use of excommunication as a political ploy to disbar voters would accord to bishops a greater theocratic role in excommunicating dissenters, and would make the state more dependent on the church than on the parliament which it could control.⁹²²

Whilst, ecclesiastical jurisdiction was correctly exercised in relation to the majority of ecclesiastical offences, and could, theoretically, be divorced from politically motivated prosecution, this cannot be said in relation to the use of excommunication for political ends and raises the more perturbing prospect that they were prepared to further political expediency over and above spiritual concerns.

Neither Horle nor Besse (at least so far as the North West is concerned) refer to the use of excommunication to disbar Quakers from voting. Neither is this mentioned in Nicholas Morgan’s locally focused book. It would seem that, unlike other measures, the policy was not directed against Quakers per se; it was a political tactic used against dissenters in the wider sense.

The next section examines the local instances of excommunication of Quakers.

4. Quakers and Excommunication

Introduction

England had a ‘tradition of plebeian anti-clericalism and irreligion.’⁹²³ Canon lawyers did not necessarily treat such dissent as heresy, although the distinction between heresy and dissent was not an easy one to make. Although Quakers

⁹²¹ Gibson (n903) 31.

⁹²² Gibson (n903) 46.

⁹²³ Christopher Hill, *The World Turned Upside Down – Radical Ideas During the English Revolution* (Penguin 1991) 25.

were excommunicated on a large scale they did not seem to have been treated as heretics.

A body corporate could not be excommunicated in case it excluded innocent members.⁹²⁴ This may explain why Quakers, who, by the 1660s were an organised and distinct body, were not excommunicated en masse.

As we have seen, in canon law theory, the purpose of excommunication was to purify the church of impure elements and to 'cure a spiritual disease rather than to aggravate one.'⁹²⁵ Quakers recognised no 'spiritual disease' in their behaviour. This was fundamental to their attitude of defiance to ecclesiastical law. Yet, despite the fact that the 'medicine' of ex communication would be ineffective, and thus amenable to canon legal theory that it should not be imposed, the sanction was frequently applied to them.⁹²⁶ George Fox complained of the overuse of excommunication against Quakers. In 1663, he challenged Dr Craddock, who visited him in Scarborough prison, for having *excommunicated abundens both in Yorkshire and Lancashire*.⁹²⁷ Some statistics are shown below.

A 1674 Tract, *Some Queries Touching Excommunication*,⁹²⁸ contains the affected Quakers' written questions to the Bishop of Aberdeen (he had refused to meet them and they presented their questions to him on his doorstep.) These pointed out theological contradictions, including, inter alia, challenging the presumed spiritual basis of excommunication whilst asserting their own spirituality. The upshot was that the proceedings against them were dropped.

The issue of conscience, with which the secular courts wrestled in the Restoration period in relation to Quakers, had been considered by canon lawyers, albeit from a different perspective. They held that, in a choice between

⁹²⁴ Gibs 1048(cited in Burn (n832)) 201.

⁹²⁵ Helmholz (n833) 204.

⁹²⁶ This may point to a tension in canon law theory as against emerging notions of legal positivism. See eg. Helmholz (n833) 209.

⁹²⁷ Journal of George Fox, ed. Norman Penney, Cambridge 1911, ii 98-99, Cited in H. Larry Ingle and Jan Ingle. 'The Excommunication of George Fox1678' (1991) The Journal of the Friends Historical Society, VI. 56; No.2 71-77.

⁹²⁸ Tract 875 No. 31, Quaker Archive.

obedience to a sentence of excommunication and obedience to the law of one's conscience, one should choose the latter.⁹²⁹

The fact that canon lawyers favoured obedience to conscience as opposed to obedience to a sentence of excommunication may go some way to explaining the readiness of bishops in the North West to carry out excommunication against Quakers, despite the fact they would not be reconciled, in that there was a recognition of the element of conscience and a view that excommunication was 'merely' an earthly punishment.

There is an inherent dichotomy in that the purpose of the sanction was defined in terms of its effect on the person subject to it.⁹³⁰

It is difficult to see how Quakers could be regarded as other than wilfully contumacious. However, greater excommunication was not universally employed against them, and there were some anomalies as shown below.

A sinister aspect revealed by this research is that Quakers were commonly imprisoned on the issuing of the writ de excommunicato capiendo. This runs counter to the spiritual aspect of excommunication as essentially reconciliatory. Helmholz stated that medieval act books show 'an extremely small percentage' of instances where bishops exercised their power to issue a significat with a view to imprisonment,⁹³¹ and 'the judges rarely made use of this harsh, 'secular' sanction.' It would seem that imprisonment as a penalty for excommunication had, historically, been sparsely used. Spurr says that, during the Restoration, the limited evidence suggests that writs de excommunicato capiendo were a last resort, because the rise of non-conformity undermined excommunication per se. He also quotes the Archdeacon of Canterbury⁹³² seeking direction from Sancroft on how to:

⁹²⁹ Helmholz (n833) 210-211.

⁹³¹ Helmholz (n833) 217.

⁹³² Spurr (n859) 216 referring to MSS Tanner 33 folios 170-171.

proceed with them that refuse to come to church and will not appear at church though cited ... I know not what sentence we can proceed to, but excommunication, which I know your Grace would avoid as much as possible.

This was in the context of his fear that not coming to church without penalty *exposes the censures of the church to new contempt*. By contrast, Spurr's own view is that the rise of non-conformity undermined excommunication.⁹³³

The cases listed in Besse and contained in the database for Lancashire, Cumberland and Westmoreland, show 66 writs de excommunicato capiendo. The predominant reason was non-payment of tithes and associated contumacy. Thus, the provisions under the two Henrician Acts, authorising imprisonment of the excommunicated by JPs for non-payment of tithes, had become particularly significant for Quakers.⁹³⁴ The local case studies reveal 37 imprisonments for excommunication over this period; that is, just over half of the non-payments resulted in imprisonment. The database shows more excommunications than imprisonments for the ordinary Quaker which would indicate that the lesser sanction was applied on the larger scale.

Reay believes the number of writs de excommunicato capiendo has been underestimated.⁹³⁵ This thesis cannot provide a national comparison but, based on the close local study, the numbers already quoted show a significant proportion of imprisonments which accords with Reay's theory. Imprisonment under sentence of excommunication could result from relatively trivial first offences. Thus, for example, in 1674 three Quakers were imprisoned following excommunication for non-payment of steeplehouse repairs.

The issue of imprisonment for excommunication was one of the matters that Quakers challenged by appealing. Heskin Fell and Roger Haydock appealed against a significat for withholding tithes in 1673, as did Thomas Langhorne and John Lambert.

⁹³³ Spurr (n859) 216.

⁹³⁴ This important issue was discussed further in Chapter Seven.

⁹³⁵ Barry Reay, 'The Authorities and Early Restoration Quakerism' [1983] 34 Journal of Ecclesiastical History 78.

Illustrations of Local Procedure

Rycroft v. Fleetwood

An evocative set of depositions, under Wainwright's authority,⁹³⁶ deal with the issue of valid service of an excommunication:

Mr. Rycroft crossed the court from Mr Fleetwood's house Sunday morning last it was about church time ... the last bell was tolling to prayers and a great many people were in church...a man in black clothes and with ...bluish stockings met them... And they see him pull out ... of his pocket and take a paper ... and present it to Mr Rycroft... and took it from him, but did not presently look at it...what the man said the depositor...doth not remember ... Mr Rycroft opened it and gave it him again saying ...a petition in Latin I have never seen before...I cannot look at it now for the congregations stays ... whereupon the man left them... The next Sunday the man came again and said My Rycroft must appear in Chester but neither told him the day nor month nor to what and nor showed him any seals...

The depositions contain the testimony of Robert Henshall (made in October 1673), a witness, William Bannister (dated 14th May 1674) and the respondent, (the minister, Henry Rycroft, dated 24th September 1674). The proposed excommunicate was Mr Fleetwood. Henshall deposed that he was *imployed and hyred as a messenger by Mr Oldfold one of the Proctors of the Consistory Court of Chester to bring an excommunication to Penwortham against Mr Fleetwood*. The depositions were, seemingly, in response to interrogatories which posed three questions based upon the alleged case for and against service and were designed to elicit specific and precise facts regarding the timing, prevailing circumstances and physical service of the document:

Interrogatory of Henry Rycroft:

who delivered the pretended Excommunication when and what hour of the day? In what manner did the pretended Messenger deliver the pretended Excommunication that day? Did not the Bell towl (sic) for prayers and was not the minister and people in readiness to begin divine service?

⁹³⁶ EDC/5/1673/36; EDC/4/1674/22 (Chester Archive). This does not concern Quakers, but illustrates machinations which would have applied to all.

The excommunication was brought back to Mr Oldfield and the number of attempts that Henshall says were made does not accord with the depositions of Bannister and Rycroft. There are hints that the vicar deliberately avoided service. We can see something of the timescale involved in obtaining witness depositions from the archival dates since the answers to the interrogatories were produced over a period of time spanning about a year.

Fell v. Brownsword (1672)

This case amplifies the tortuous appeal process. The combination of sources: Besse,⁹³⁷ the papers of Daniel Fleming,⁹³⁸ and the Borthwick Institute cause papers⁹³⁹ illustrate the respective outlooks.

Fleming's papers contain a letter, dated 13th February 1671, from the vicar of Kendal, William Brownsword. It encloses an inhibition procured by Quakers, which challenged the legality of Brownsword's actions.

Brownsword had been summonsed to York to answer the appeal to Dr Thomas Burwell, which he found *humbling*. He writes to Fleming:

the 98th canon of the Church of England seems very full to my case decreeing that no obstinate or factious persons shall have their appeals admitted or allowed until the persons appellant personally promise and avow that they will faithfully keep and observe all the rites and ceremonies of the Church of England ... and all this grounded upon the rule that they who break the laws cannot ...claim any benefit or protection by the same.

Such allusion accords with canon lawyers' theory of the inherent justice of canon law but it does not seem to accord with the provisions for appealing excommunication. The full Canon 98 states:

... they who break the laws cannot in reason claim any benefit or protection by the same, we decree and appoint that after any judge ecclesiastical hath proceeded judicially against obstinate or factious persons, and contemners of ceremonies, for not observing the rites and orders of the Church of

⁹³⁷ Besse (Sessions Trust 2000) 18-19.

⁹³⁸ WDRY 5 (Cumbria Archive, Kendal).

⁹³⁹ Cause Papers, CP H 3104-6 (Borthwick Institute).

England, or the contempt of public prayer, no judge ad quem shall ... allow any of ...their appeals, unless having seen the original appeal, the party appellant do first personally promise ...that he will faithfully observe all the rites and ceremonies of the Church of England, as also the prescript form of a common prayer...

Was this a Catch 22, or was it the case that Brownsword misinterpreted this? It seems logically to apply to non-observance of rites etc. rather than non-payment of tithes which is what this matter concerned.

The basis of the appeal seems to have been that the appellants had not been personally summonsed to appear.⁹⁴⁰ This, if proven, would be a clear technical breach of procedure and, if in relation to the citation to answer excommunication, would have vitiated the excommunication.

Those named in the inhibition include some of the more persistent offenders, or dedicated Quakers, depending upon perspective. They were Robert Barrow, Margaret Howgill, Miles Bateman, Miles Hubbershaw and John Fell.⁹⁴¹

Dr Burwell had issued the writs de excommunicato capiendo against them. A year later however, on 27th June 1672, he upheld their appeals against excommunication.⁹⁴² (In this sense, the chancellor was representing the archbishop as the senior judge in the court since archbishops rarely heard cases themselves.) It is likely that the Quakers felt that they had strong grounds for an appeal because the costs were between £1 14s 2d and £2 15s.⁹⁴³

Besse notes the fact that the person who excommunicated them and considered the appeal was one and the same. A limitation on this did necessarily not operate in the York appellate process. It is noteworthy that one of Charles II's early declarations, of 25th October 1660, was that no bishop should exercise

⁹⁴⁰ Francis Nicholson and Ernest Axon, *The Older Non-Conformity in Kendal* (Titus Wilson 1915).

⁹⁴¹ Their names appear frequently in Fleming's list of persons charged for conventicles and in Besse (Sessions Trust 2000).

⁹⁴² CPH 3104-6 (Borthwick Institute).

⁹⁴³ WJ Sheils, *Ecclesiastical Cause Papers at York: Files Transmitted on Appeal 1500-1883*. (University of York, Borthwick Texts and Calendars 9, 1983) (Introduction xii).

ecclesiastical jurisdiction without Presbyterian assistance and no chancellor should exercise excommunication and absolution. The intention, presumably, was to prevent what occurred in this instance. However, the declaration was not upheld following the Worcester House conference.

Another feature is that this process may indicate that excommunication was not examined in detail at first instance and, was, therefore, rather mechanical.

The contents of the cause papers are identical for each appellant. Fell alleges in five detailed articles of libel that:

(The full cause paper is appended).⁹⁴⁴

1. Brownsword had cited him before Thomas Craddock MA, (Joseph Craddock's surrogate) in Richmond in order to answer a certain cause concerning the withdrawal of tithes and of other ecclesiastical rights and this he contests.
2. He had not been lawfully cited by sufficient notification to answer the same, and Craddock, favoured Brownsword's *deceitful petitions and persuasion*, and cited him to appear before him at completely unsuitable times. There was insufficient reason for the contumacy and excommunication.
3. All of the foregoing accusations, invalidities, iniquities and injustices, as well as particularly the decree of the sentence of excommunication promulgated against John Fell, were appealed before Archbishop Richard Sterne, in another court of the consistory of York.
4. Brownsword is the present vicar of the parish church of Kendal in the archdeaconry of Richmond, and that he managed to interfere with your jurisdiction in this cause by reason of an appeal.
5. the foregoing is the public voice and fame within the said parish of Kendal.

Fell prayed that Brownsword be condemned by ecclesiastical censure and compelled to pay the debt of the expenses incurred, and to be incurred lawfully,

⁹⁴⁴ Translated from Latin by Dr Paul Dryburgh, Archivist, Borthwick Institute.

in this business and requests it be done jointly and severally, *not straining themselves to prove each and all of the foregoing matters.*

Brownsword provided a formulaic response to each of the articles.

In practice, this did not advance matters as the corresponding entry in Besse⁹⁴⁵ demonstrates. Besse cites the illegality of which the Quakers had been advised in relation to the original proceedings brought against them by Brownsword, in 1666, for *small tithes and Easter-offerings*. They were sentenced in 1668 in the Richmond consistory court to several weeks in prison for this. After lodging an appeal to York, they were released *and likely to recover charges*⁹⁴⁶ against Brownsword. He was required to take an 'Oath of the Legality of his Prosecution',⁹⁴⁷ following which the Quakers were required to swear (although it is not clear which oath since the oath of calumny would not apply to them as laymen.) They were put back to being in contempt. *While these matters were pending, both the Priest and Dr Burwell died.*⁹⁴⁸ The prosecution seems to have died with them. It appears that the release from prison, pending appeal, followed the canon law provision regarding appeals as outlined in above.

Excommunication and Oaths

The database contains around 92 proceedings where Quakers were prosecuted for a particular contravention, but, ultimately, suffered more serious consequences, particularly imprisonment, for refusing to answer on oath in response. Consequently, it was a short step from a relatively trivial initial offence to one with serious consequences. Oaths were required in a number of different circumstances.⁹⁴⁹ Horle⁹⁵⁰ records that Quakers queried the 'presumed' power of the ecclesiastical courts to require an oath when Friends appeared before them to answer to and show cause as to why they should not be excommunicated. In

⁹⁴⁵ Besse (Sessions Trust 2000) 18-19.

⁹⁴⁶ According to Besse *ibid* 18-19.

⁹⁴⁷ The oath of calumny.

⁹⁴⁸ Besse (Sessions Trust 2000) 19.

⁹⁴⁹ As discussed in Chapter Five.

⁹⁵⁰ Horle (n892) 232.

fact, as we saw in Chapter Six, 3 Jac c.4 stated that both bishops and JPs could lawfully tender the oath of allegiance (although it was not mandatory). In 1675, Heskin Fell was excommunicated for refusing Easter-offerings and an oath in Chester consistory court and then imprisoned by two JPs, and so we see how this Act operated in practice.

Quakers were advised by counsel, Roland Vaughan⁹⁵¹ to appear, in person, or by proctor, and to obtain copies of the libels exhibited against them '*in the presence of some persons who can make affidavit of such demand if occasion require.*' This seems to indicate that they were prepared to engage someone who could swear an oath. Then they should retain able counsel to draw up their answers and go with that counsel and present their formal signed answers. This is relevant to the accusations that dissenters undermined the ecclesiastical court processes, in not appearing in answer to a citation. Pollexfen advised that counsel should insist that this should be accepted without an oath on grounds that no ecclesiastical court had power to administer an oath *in any case other than causes matrimonial or testamentary*. If they were still imprisoned, counsel should inform the Kings Bench that they had tendered their answers before the sentence of excommunication was pronounced, which should have been accepted, and should ask the court to grant a *supersedeas*.⁹⁵² However, a difficulty that Quakers encountered was that the oath was tendered when they appeared in response to a citation and then they would refuse to take it.

Besse includes numerous instances of *excommunicato de capiendo* that led to imprisonment. His focus being upon imprisonment, he does not include all instances of excommunication: this study shows that excommunication of Quakers took place on a larger scale than he recorded. A notable omission is the excommunication of the Quaker founder and leader, George Fox, in the light of whose prominence one would have expected at least a mention, if not an expression of outrage. The fact of his excommunication seemingly came to light to historians by chance and he does not refer to it in his journals.

⁹⁵¹ Book of Cases YM/MfS/BOC/1 (Quaker Archive).

⁹⁵² Ibid 175-6, also quoted in Horle (n892) 251 fn120.

The Excommunication of George Fox, 1678,⁹⁵³ illustrates how excommunication could be used as a bar to proceedings. A dispute over the ownership of Swarthmore Hall, the Fell home and estate, was continued by Hannah Fell, the widow of Margaret Fell's estranged son, George. When Fox and the Fells filed a complaint in the Lancashire Palatine Chancery Court, Hannah Fell, in response, asked to be excused from responding because the plaintiffs had been excommunicated. The specific cause of the excommunication was unknown but it followed the annual visitation of the Bishop of Chester, John Pearson, to Ulverston Parish, sometime in 1678. Neither Fox, nor the other Fells, sought absolution from the penalty. The decree that was copied by a notary (Richard Trotter) for Hannah Fell's lawyer recites this. He must, therefore, have obtained access to the excommunication document as an ecclesiastical record. George Fox and the Fells retained the land that was the subject of the dispute, so it is not clear how the matter was ultimately determined.

Legal Advice

The precise scope of the legal disabilities attendant upon excommunication was a matter upon which Quakers sought legal advice and which they challenged through litigation. Entries in the Book of Cases show concerns about the interplay between the ecclesiastical and secular courts and about the practical issues they faced concerning the scope of the ecclesiastical courts and their procedures.

There were formal queries, both generic and case specific. The following extracts reveal a lack of familiarity with excommunication and its attendant procedures, which was probably common to most citizens. It also indicates Quakers' anxiety about it, contrary to a general impression that they were unconcerned because

⁹⁵³ H Larry and Jan Ingle, 'The Excommunication of George Fox, 1678' [1991] 56/2 Journal of Friends Historical Society 71-77. See also Consett (n 840) 60 which helps place these proceedings in their legal context. Consett states that sealed letters of excommunication had to be proved within eight days of the Defendant's objection that the Plaintiff was excommunicated and this would usually stop the Plaintiff's case.

they were not interested in belonging to the Church of England, and Horle's view that they saw it as meaningless.

Q. Whether the writ de excommunicato capiendo be not repealed or taken away by the repeal of the writ De Heretico Comburendo.

A. No: there being an express proviso in that Act to save it and without that. the body of the Act would not extend to take it away.

Q. Whether the statute of Henry VIII by which Justices are empowered upon the Bishop certifying a person to be excommunicated to send the person to prison be in force?

A. The statute of Henry the Eighth is in force and hath been sometimes though but rarely put in execution since the King's Restoration.

This question indicates that Quakers, and perhaps the lawyer, were surprised to find this statute in operation. Till notes that it was, in general, rare to find this cited in the York courts, but there was a clutch of cases using this in 1673 (two cases are mentioned above.) He suggests, too, that the petition to secular power to imprison spiritual offenders had to come from the archbishop himself.⁹⁵⁴ I have found, however, that it was in use directly by the Commissary of the Archdeaconry of Richmond as shown by the warrants citing this Act in the tithe chapter from 1668 onwards.

Q. Whether the Bishops have any power to excommunicate and for what causes and whether the law that impowered them was not repealed in the King's father's time?

A. ... the ancient power which the Bishops and Ecclesiastical courts had heretofore was as Ecclesiastical ... to have taken them away by the Statute of 16 Car but all is Restored again by an Act of this present Parliament under the 13th of this King favouring the power to examine any person upon any

⁹⁵⁴ Till (n876) 142.

*criminal matter or think against himself whereby he may be lyable to censure or imprisonment.*⁹⁵⁵

Q. Whether there be any statute to impower any to send persons to prison for not paying for bread and wine and Easter Reckonings?

A. ... there is no law to imprison any found repairing Churches immediately but they may be such for not paying...[the same]the Ecclesiastical Courts to an excommunication and afterwards taken and imprisoned by the Writt de excommunicato capiendo.

How to prevent excommunication for non-payment of Tythes.⁹⁵⁶

Instructions and Directions for such of the people called Quakers as are or have been cited into ecclesiastical courts for non –payment of tythes or not contributing towards the reparation of steeplehouses, or parsons wages etc in order to make their legal defence to prevent their being excommunicated for their not answering such libels as shall be exhibited against them in such courts upon oath as followeth.

The full version of these instructions is set out in the Appendix.

Corbett, counsel instructed by the Quakers' recording clerk, advised that there was no common law action against a sheriff who allowed liberty to excommunicants although the sheriff could be fined for neglect. The justification was that the judgment upon which the imprisonment was grounded came from the spiritual court so it was not a writ of execution to retain the party until he satisfied any sum of money or costs of suit. His rather complicated answer relates to the provisions described above.

He was also asked if gaolers could put them with felons. Corbett advised not, relying on 22 and 23 Chas II c.20 which forbade debtors being imprisoned in the same room as felons.

⁹⁵⁵ This refers to the Clergy Act.

⁹⁵⁶ Book of Cases (n952) 176 (Unattributed advice).

He confirmed that justices still had the right to imprison for excommunication simply on certificate from a bishop (a reference to significats), but said this was rare since the Restoration.⁹⁵⁷ However, in the North West, as we have seen, this happened relatively frequently.

On a specific case, a writ of excommunicato capiendo for John Hurley was defective because no certificate from the prerogative court or record in Crown Office was obtained. This brought advice to move for a Habeas Corpus to remove him to the King's Bench. He was released and all the proceedings from the beginning of the cause voided.

Horle⁹⁵⁸ refers to queries about individual abuses such as a *mittimus* which failed to make clear upon which statute contumacious Friends were imprisoned, so they were being prosecuted in both secular and ecclesiastical courts. Quakers ascertained that some statutes specifically prohibited this overlap and the first punishment could be pleaded as bar to further prosecution. It is conceivable that each court was unaware of the others intended prosecution but if, once pleaded, the ecclesiastical court refused to accept that plea, and did not grant a stay, the matter could be referred to the 'superior' Westminster courts for a *Prohibition*.⁹⁵⁹

An abstract of a letter in March 1677 with counsel's opinion⁹⁶⁰ concerns Richard Lancaster who was excommunicated by the *spiritual court* in Chester before his death.⁹⁶¹ The question was whether his will was void as there was a belief that a person dying excommunicated and having continued excommunicated for twelve months before death could not make a will.

⁹⁵⁷ Book of Cases (n952) 16-17, 50-51, 117.

⁹⁵⁸ Horle (n892) 232.

⁹⁵⁹ Fn London Yearly Meeting 1:112-3.

⁹⁶⁰ Book of Cases (n952) 26.

⁹⁶¹ This further illustrates the fact that Besse's work does not contain all excommunications. Richard Lancaster does appear in relation to tithes proceedings in 1685 but there is no mention of excommunication and the tithe entry post-dates the excommunication that was the subject of Counsel's advice.

Corbett advised that excommunication did not incapacitate him under 1 Eliz c.1 and he cited the canonical authority, Dr Godolphin. In a further example of the temporal courts' power to override ecclesiastical jurisdiction:

Q. If the ecclesiastical court will proceed to make a will void whether in the temporal court there will not be a prohibition?

A. the court of King's Bench will, upon a motion, send a mandamus to the ecclesiastical court to command the judge thereof to grant the Administration to the wife of the said Richard Lancaster in case of the ecclesiastical court delays of the granting of the same or grants to any other. I have known the like mandamus granted.

The Book of Cases, therefore, reveals a range of practical legal issues that arose as a result of excommunication. Counsel advising Quakers clearly needed some knowledge of ecclesiastical law and it is apparent that Quakers had concerns around ecclesiastical jurisdiction as it was being applied to them once the ecclesiastical courts were restored.

5. Conclusion

This chapter has explored the nature of excommunication and the legal procedure through which it was imposed. It argues that there was marked difference between theory and practice, which the various tracts cited in Section 3 highlight, alongside the real instances that have been found in the local and national sources described in Section 4.

Helmholz posits 'It is the question of what canonists expected the sanction [of excommunication] to accomplish which offers some aid in evaluating its effectiveness in practice.'⁹⁶² Some examples of its effectiveness have been considered within this chapter.

The range of legal disabilities that excommunication entailed, such as the problem of staying the administration of an estate during excommunication,

⁹⁶² Helmholz (n833) 205.

demonstrates the administrative complexity resulting from the parallel legal systems. It shows how ecclesiastical courts, with their different focus and aims, operated in a way which could simply halt the resolution of an issue, contrary to how we see the legal process should function. Similarly, as the cited local case study Fell v Brownsword illustrates, despite the designated appeal process outlined in Section 2, in practice, appellants became mired in the convoluted procedure.

The local examples, coupled with Quakers queries to Counsel, in section 4, show that Quakers encountered an inherent impasse with regard to the absolution from excommunication that was described in Section 2. This illustrates how far from both its spiritual origins and its theoretical canon law purpose the sanction had crept. This is particularly marked in relation to the practice in relation to significats which the instances involving Quakers have demonstrated.

The primary purpose of excommunication was reconciliation which begs the question why the ecclesiastical authorities excommunicated Quakers who were not interested in such reconciliation. Excommunication would neither achieve spiritual cleansing nor reconciliation and so its primary purpose was to no avail. Its use, under canon law theory, was, therefore, highly questionable.

An impression is that it was an impotent penalty, unless those who became subject to it felt susceptible to its spiritual force. However, the extent to which it was used, the legal disabilities that surrounded it and the fact that imprisonment could result means that, so far as Quakers were concerned, the penalty could inflict real damage.

There is ample evidence that excommunication, and the issue of significats, was widespread within the diocese of Chester (although this was not confined to Quakers). There is also evidence, as discussed in Section 4, of the readiness to imprison excommunicated Quakers, which is an important matter to be weighed in the overall attitude of the Restoration authorities, both ecclesiastical and secular, against Quakers

In practice, excommunication was readily imposed for pecuniary offenses and procedural transgressions. If the Church of England's sanctions for ecclesiastical offenses and the ultimate sanction of excommunication were not respected, individual vicars, responsible for their parishes, were helpless in the face of the flouting of ecclesiastical law. One of the primary focuses of the Church of England in the Restoration was to enforce adherence to its own laws in the ecclesiastical courts. There may, therefore, have been an increasing use of excommunication as a means of maintaining both authority over and above the recovery of income which often formed the basis of the cases at first instance.

Quakers' response to excommunication was reactive. They seem to have taken few steps to avoid it in the first place, but it appears from the legal advice that they sought that they were not fully aware of how it could be imposed or of its full potential consequences. These questions suggest that Quakers were unaware of the potency of latent episcopal and ecclesiastical court power which was re-asserting itself.

This exposition of excommunication therefore reveals a number of aspects about the use of the sanction in the seventeenth century that have not been widely acknowledged.

CONCLUSION

Summary

This thesis offers a legal analysis of the substantive law that underpinned the sufferings of the Quakers in the North West during the Restoration period. The thesis contends that the perspective of legal history is essential as an analytical framework for the religious persecution of Quakers. It also asserts the importance of an empirical study of the particular laws as topics in their own right.

The implications of this research are not constrained by its focus on Quakers, as the thesis also illuminates the structure and operation of the mid-seventeenth century legal systems generally, in respect of the areas of law in question. These comprised tithes, oaths, ecclesiastical offenses and conformity with the Anglican church.⁹⁶³ With the exception of the issue of conformity, which was peculiar to the period, the said laws were vital and enduring aspects of seventeenth-century law, religion and society but they have been under-researched.

The thesis has built upon Horle's⁹⁶⁴ work on the English legal system in this period. It has adopted the medium of a localised, empirical study⁹⁶⁵ in order to address the 'dearth' of such studies concerning the law that he identified.⁹⁶⁶ It has also explored the following themes within the existing literature:⁹⁶⁷ local autonomy and antipathy towards Quakers; the impact of the restored ecclesiastical jurisdiction; radicalism amongst early Quakers and its effect upon their attitude to the law; Quakers' institutionalisation of suffering; and their (rhetorical) claim to innocence.

⁹⁶³ Besse's quotation is set out in the introductory chapter which, in conjunction with Chapter One, further explains the choice of legal topics.

⁹⁶⁴ Craig Horle, *The Quakers and the English Legal System, 1660-1685* (University of Pennsylvania Press 1988).

⁹⁶⁵ the reasons for which are set out in the methodology (Chapter One).

⁹⁶⁶ Horle (n 964) x-xi.

⁹⁶⁷ As set out in the introductory chapter.

In general, the findings confirm Horle's account of the operation of the law nationally⁹⁶⁸ but the detail from the close local studies qualifies and differs from his account in the respects set out below.

Mid-seventeenth century law was a "quagmire"⁹⁶⁹

I have elucidated some of the abstruse aspects of civil, criminal and ecclesiastical law that Quakers encountered. The English legal system at this time contained a multiplicity of fora and laws. The various courts operated according to different procedures. We have seen examples of secular cases in quarter sessions, assizes, the Exchequer, local manor courts and summary proceedings. In the ecclesiastical courts, we have encountered the York provincial appeal court, the consistory courts of Richmond and Chester and the visitation and correctional courts. The study of the practicalities of tithe law in operation perhaps provides the best illustration of the various courts through which Quakers might pass.⁹⁷⁰

Horle described the legal system as characterised by 'primitive procedure, jurisdictional complexity, legal fictions, time consuming writs, imprecise legislation.'⁹⁷¹ As we have seen, the Conventicles Acts were difficult to interpret, including their very definition of an unlawful conventicle. The so-called 'Acts against Popish Recusants,' imprecisely alluded to Protestants. Jurisdiction was indeed complex.

However, I take issue with the assertion that the system was primitive. Legal fictions abide and serve a purpose, and most legal processes are time-consuming. The research has produced examples of mature ecclesiastical and secular legal processes which were rule-based and not arbitrary, and had procedural and evidential standards. Notwithstanding the criticisms of oaths, the evidential

The exclusion of the Isle of Man from the North West, is unlikely to alter the position. The numbers involved may be smaller, but, if anything, the position of Quakers there would be worse given the fact that they were banished and suffered severe penalties.

⁹⁶⁹ Horle (n964) 26.

⁹⁷⁰ Chapter Seven.

⁹⁷¹ Horle (n964)203.

concepts that are apparent in their respective formulations evince a degree of sophistication, particularly so in relation to ecclesiastical oaths.⁹⁷²

Legal frameworks were sufficiently coherent that we can identify certain aspects as departures from the norm; cases such as the unlawful levying of distress, the use of violence, the illegal breaking down of doors and so on. Justice systems were placed under considerable stress by Quaker recidivism and contumacy and, as my research has shown, they were not always able to constrain abuses of power. This was particularly the case where decision-makers had strong personal prejudices or were themselves under pressure and acting in a dual capacity (for example as JPs and Deputy Lord Lieutenants) which could affect their objectivity.

Abuses were not unchallenged but that involved the use of cumbersome and adversely weighted legal procedures. Appeals were limited in secular proceedings. Demurrals were technically available but were not necessarily followed through. Administrative law remedies, such as *certiorari*, were also available but expensive. There was a designated appeal route in ecclesiastical processes but this did not necessarily halt the original proceedings.

Localism

My research focuses on a remote and very particular region but highlights legal and jurisdictional problems that were often common to the country as a whole. We are not concerned with local laws, although the Northern Province had its own procedural rules. However, local custom was incorporated into seventeenth-century society and legal processes. Tithe law precisely ordained the means by which *modi* were to be contested. We saw, in Chapter Seven, an example of the impact of a contentious challenge to tithe custom. When these untested local customs were confronted by Quakers, the consequences for them were dire, especially since objection to local custom involved a challenge to the authority of the gentry and clergy at local parish level.

⁹⁷² Chapter Five.

This appears to have led historians, such as Penney,⁹⁷³ to conclude that the JPs were wholly antipathetic to Quakers and more autonomous than in fact they were allowed to be. Reay correctly states that the King did not instigate zealotry, but he implies that the local counties initiated it.⁹⁷⁴ We saw⁹⁷⁵ that particular royalist Anglicans in the North West, such as Fleming and his allies, were vehemently antagonistic towards Quakers, but other magistrates operated in accordance with their legal duties. It was parliament and the bishops who instigated the law and who legislated to put the onus upon local magistrates and Deputy Lord Lieutenants to deal with the Quakers.

The sources that we have examined provide more evidence of conscientiousness on the part of JPs than Quaker historians would have us believe. In so far as JPs could exercise discretion in the operation of the law, it is probable that any differences in treatment were a question of degree and determined by the scale of Quaker membership in any given locality and the extent to which local judges disliked them. JPs did not have free rein. It is likely that some were unsure about what they were supposed to be doing with the changing intimations as to tolerance and intolerance emanating from the centre, because there is strong evidence of the need for judicial guidance.

Local magistrates' records have also shown another side to the prosecution of Quakers for attending conventicles that is not reflected in Besse's abstract, although it supports the Quakers' viewpoint. The specific provisions under the range of laws against conventicles is under-appreciated, and the scale of summary proceedings for conventicles is obscured. One consequence of using severe sufferings to highlight deficiencies in the law⁹⁷⁶ is that petty proceedings

⁹⁷³ Norman Penney (ed) 'Extracts from State Papers relating to Friends 1654-1672' 1913 (Friends Historical Society, London, Headley Brothers) 6.

⁹⁷⁴ Barry Reay, 'The Authorities and Early Restoration Quakerism' [1983] 34 *Journal of Ecclesiastical History* 69-84.

⁹⁷⁵ In Chapters Three and Four.

⁹⁷⁶ Kate Peters, *Print Culture and the Early Quakers* (Cambridge University Press 1994) 204.

are not accorded the weight that I believe they should have if the true nature and scale of legal processes against dissenters is to be considered.

Contrary to Horle's assertion⁹⁷⁷ that: 'There was little ... direction in law enforcement' we have seen that there was, indeed, central direction with regard to policy against Quakers and other dissenters, and that local figures and central authorities were linked by channels of communication. Fleming's documents,⁹⁷⁸ indicate that he and other zealots, having regard to local circumstances, viewed the King's attempts at leniency and toleration as ill-considered and naïve,⁹⁷⁹. They complained about the relative laxity of some magistrates.

Radicalism

Horle states: 'For any system of law to work effectively, there must be a high degree of co-operation between those who legislate, those who enforce and those who are law-abiding ... From 1660-1685, in the contentious area of religion, that pre-requisite was entirely lacking.' The Quakers' beliefs very much set them against the consensus that local and national authorities were struggling to achieve. One cannot get away from the novelty and gravity of the challenge that Quakers brought to the law.⁹⁸⁰

Quakers rebelled against ecclesiastical and secular law and they sought radical revision of the temporal law. They wanted to fundamentally change the interaction between law and religion away from its prescriptive Anglicanism. Their active non-compliance with the law was not confined to written campaigning about true injustices, such as the use of the Acts against Popish Recusants. At the same time, whilst most Quakers resisted acts against their formal beliefs, they recognised that it was permissible to use defects in the law or legal processes to try to counter attacks against them. So, they engaged in

⁹⁷⁷ Horle (n964)271.

⁹⁷⁸ In Chapter Three.

⁹⁷⁹ Irrespective of the parliamentarians abhorrence of royal declarations and proclamations,

⁹⁸⁰ I acknowledge that the issue of Quakers and the law in this period gives rise to a number of jurisprudential questions. This is outside the scope of this study and I have merely alluded to them, for instance, the influence of natural law upon Quaker thought, and legal positivity.

legal ways. Although they were driven by conscience, their behaviour inevitably led them into conflict with the law of the church and the state in a manner that was purposeful and avoidable.⁹⁸¹

The tithes chapter explored how Quakers' radicalism in this regard breached both secular and ecclesiastical law, which meant, in practice, that they deliberately threatened the legal rights of impropriators and clergy and economic and ecclesiastical governance.

The narrative of persecution is based upon the Quakers' institutionalism of suffering and their rhetorical claim to innocence which may, sometimes, have impeded objective analysis. Some Quakers lapsed in practice or succumbed to pressure, for instance, to pay tithes. The importance of their own, sometimes unforgiving, systems of discipline has been underplayed in Quaker literature. Their high degree of discipline, and their engagement with the law and principled pragmatism, set the scene for later success in business and political lobbying, unlike other groups who did not survive. They were eventually able to function in society but not, ultimately, to persuade it and so they remained a minority cause.

Impact of Re-establishment of Ecclesiastical Courts

The Quakers were obviously affected by the restoration of a conservative ecclesiastical system but this has not been extensively explored in Quaker literature. The thesis has not explored all the aspects of that restoration but it has attempted to address the historiographical lacuna in respect of the implications for Quakers.

⁹⁸¹ One of the conceptual limitations to this thesis is that I have not explored Quakers' theology in terms of their approach to the law because the focus of this work has been upon the practical operation of the law. Theology would provide a different theoretical orientation, although my view is not inconsistent with recent work on the very early Quakers (as referenced in the introductory chapter) which has emphasised radicalism in their theology.

It was not simply that Quakers fell afoul of the law because they did not pay tithes, pay for sacraments or attend church. They were exposed to pre-existing legislation aimed at Catholics. Even though it is probable that the poverty of the clergy following re-establishment had as much to do with the proceedings against them as religious conformity, once the secular arm took over to enforce penalties, these were disproportionate and ran contrary to canon law's conciliatory aim.

In exploring the connection between English post-Reformation law, religion and dissent, my research has brought to light a number of issues regarding the practical operation of canon law and the intersection with secular law. Quakers' experience does not accord with conventional views. The use of excommunication in this period has not been understood and it is hoped that this work has shone some light upon that, including the significant practical difficulties that surrounded the penalty, the scale of it and the processes and consequences that excommunication involved.

Dissent

Horle considered that the law was fundamentally opposed to religious toleration. The laws could be sub-divided into those that directly concerned religious conformity and toleration of dissent and those that were concerned with different issues, such as tithes and oaths.

This study has not investigated individual cases involving other dissenters, but the sources that have been considered, showing the way in which Quakers used and experienced the law, illustrate the struggle between other non-conforming subjects, the law and the state too.

We have seen that the law was used to enforce Anglican conformity from Tudor times. The Restoration drew both upon pre-existing statutory law and imposed fresh legislation to this end. It is not the purpose of this work to assess whether this was the assertion of political power over religion or whether such assertion of power was simply to stop religious division which are historical questions.

What we have seen is the practical result. The Clarendon Code neither favoured toleration of non-conformity nor eradicated it.

The law was not experienced uniformly by dissenters. Quakers bore the brunt of the legislation against conventicles⁹⁸² and in relation to oaths because they would not acquiesce. By contrast, I have shown differences between the law's application against Quakers as compared to other dissenters. This includes the use of excommunication against dissenters for political reasons, which does not appear to have been applied as a measure against Quakers.⁹⁸³

The non-conformist aspects of Puritanism, as well as anti-Catholicism, that were addressed in Elizabethan legislation were exploited for political ends in the Restoration. This became anti-Protestant dissent within a Protestant state, about which the authors of anonymous tracts and people, such as Thomas Rudyard, complained.⁹⁸⁴

Limitations

The case studies are selective and not exhaustive. They were constrained by accessibility⁹⁸⁵ and the exercise of ranging across civil, criminal and ecclesiastical law. I hope, though, that they have laid a foundation for further research in this difficult area. For example, there is scope for a number of in-depth empirical studies concentrating closely on specific areas of law. Similarly, this study has not encompassed an investigation of transportation of Quakers which would, in itself, be a fruitful area of research.⁹⁸⁶

In terms of ecclesiastical legal history, I have touched on visitations, but my account is simply illustrative. I would single out tithe law and excommunication as meriting detailed study outside of the narrow period with which this research has been concerned.

⁹⁸² Chapter Three.

⁹⁸³ Chapter Eight.

⁹⁸⁴ Chapter Six.

⁹⁸⁵ Chapter One explains this.

⁹⁸⁶ For the reasons described in Chapter One.

Conclusion

This thesis has critically examined the conventional historical accounts of the law as an instrument of persecution against Quakers, who were, they claim, an enlightened religious denomination persecuted for their religious beliefs before the rest of the country became enlightened. It has also considered the contrary, authoritarian, view that the Quakers threatened and undermined the church and the state.

In general, I disagree with the premise that religious bigotry was the driver for all proceedings. It certainly played a part but I have, perhaps controversially, suggested that there was also religious bigotry on Quakers' part. Quakers asserted themselves against the use of the law as an instrument of power to enforce religious conformity. There is no doubt that Quakers suffered very badly for their faith, however, the concept of persecution provides an inadequate paradigm for their experience in practice. It was not simply the product of ill-educated harassment or victimisation as some tracts, such as Atkinson's,⁹⁸⁷ seek to convey.

The matter of the Quakers, in fact, went even further than issues of religious conscience. By their rejection of oaths, tithes and laws, the Quakers repudiated the broad framework that maintained the prevailing social, economic and political order and they challenged the delicate religious balance that began to emerge in the Restoration Period.

⁹⁸⁷ Thomas Atkinson, *The Christian's Testimony against Tithes, In an Account of the great Spoil and Rapine committed by the Bishop of Chester's Tythe-Farmer at Cartmell in Lancashire, 1678*, as set out in Chapter Seven.

CHRONOLOGY

Significant events.

Measures unfavourable to Quakers.

Measures favourable to Quakers.

1660

General Monck crushes rebellion

Mass imprisonment of Quakers under Jacobean and Elizabethan legislation and common law/ riot

Long Parliament assembled

Long Parliament dissolved

Savoy Conference

Convention Parliament

Declaration of Breda

Act for Ministers and Payment of Tythes confirmed

Act of Indemnity and Oblivion

Restoration of Charles II

George Fox and leading Quakers imprisoned

Worcester House Declaration

Act for Confirming and Restoring Ministers

Corporation Act

Militia Act

Quakers' 1st peace statement

Trial of Regicides

Convention Parliament dissolved

General Election

Quaker Declaration of obedience and peace

1661

Venner uprising

Mass imprisonment of Quakers under common law /riot and Jacobean and Elizabethan legislation

King's prohibition of searching or seizing without warrant

Quakers' Peace Testimony

Coronation of Charles II

Anniversary of Charles I' execution

Cavalier Parliament

Clergy Act

Ecclesiastical Jurisdiction Act

Militia Act

Corporation Act

Petitions Act

Sedition Act

1662

King's Proclamation aiding Quakers

Declaration of Indulgence

Quakers freed from prisons

Quaker Act

Act of Uniformity

Act for Better Ordering of Forces

Licencing Act

Great Ejection

1663

Archbishop Sterne's First visitation

Northern (Kaber Rigg) Plot

1664

George Fox and Margaret Fell imprisoned and convicted at Lancaster

Conventicles Act

Margaret Fell praemunired

1665

5 Mile Act

George Fox praemunired

Margaret Fell's Swarthmore Estate granted to George Fell by Charles II

Great Plague in London

1666

Parliamentary Session

George Fox released from prison

Great Fire of London

1665-1667

2nd Dutch War

1667

King's Enquiry into Gaols

1668

Margaret Fell released from Lancaster Castle

King's Proclamation against Conventicles

1669

End of Parliament Session

Archbishop Sterne's Second Visitation

Parliament Session

1670

Conventicles Act

Marriage of George Fox and Margaret Fell

Quaker Resolution to receive Sufferings from Counties and communicate these to Government

1671

Margaret Fell pardoned

1672

King's request for details of persons imprisoned

Declaration of Indulgence

General Pardon

1672-1674

3rd Dutch War

1673

Parliament Session

1st Test Act

1674

George Fox praemunired and imprisoned in Worcester

1675

Draft of an Act for composing differences in Religion and inviting sober and Peaceably minded Dissenters into service of the Church

1676

Order enforcing law against conventicles and popish recusants

Quaker Book of Cases established

Compton Census

Fox released from Worcester Prison

1677

1677-1681

Exclusion Crisis

1678

General Election

Heresy Act

2nd Test Act

Titus Oates Plot

Cavalier Parliament dissolved

English Parliament Session

1679

Habeus Corpus Act

English Parliament dissolved

1680

Parliament Session

Rudyard's Petition re Acts against Popish Recusants

Exclusion Bill

End of Parliament Session

General Election

Oxford Parliament assembled

Oxford Parliament dissolved

1681

1682

Privy Council Order for leniency

1683

Rye House Plot

1684

Order halting proceedings against Conventicles and Popish recusants

1685

Death of Charles II

APPENDIX

1. Primary Sources referred to in Chapter Three

i. Text of King's Proclamation 10th January 1661

Whitehall. King's Proclamation Prohibiting All unlawful and seditious meetings and conventicles under pretence of religious worship.⁹⁸⁸

Although nothing can be more welcome to us that the necessity of mayntayninge some part of that liberty, which was indulged to Tender Consciences by our Late gracious Declaration; yet since diverse persons (known by the names of Anabaptists, and Quakers, fifth monarchy men, or some suchlike appellation, as a mark of distinction and Separation) under pretence of serving God, do dayly meete in greate numbers in secret place, and at unusual times, by reason whereof they begin to boast of their multitudes, and to increase in their Confidences, as having frequent opportunities to settle a perfect Correspondency and Confederacy between themselves, of which some evill effects have already ensued, even to the disturbance of the public peace by Insurrection and murther, for which the offenders must answer by the Law, and ... worse may still be expected, unless some speedy course be taken to prevent their further growth.

To the intent therefore that none of those persons, who have presumed to make so ill ...of our indulgence, may be strengthened in such their proceedings by any general Wordes, or expressions in our late Declaration We have though it fit by these Presents to publish and declare our royal Will and pleasure, That no meetings whatsoever of the Persons aforesaid, under Pretence of worshipping God, shall at any tyme hereafter be permitted, or allowed, unless it bee in some parochial Church or Chapell in this realm, or in private houses of the persons therein inhabiting. And that all meetings and assemblies whatsoever, in order to any spiritual exercise or serving of God by the persons aforesaid, unless in the places aforesaid, shall be esteemed, and are herby declared to be unlawfull Assemblies, and shall be

⁹⁸⁸ Mary Anne Everett Green and Others (eds) *Calendar of State Papers, Domestic, Charles II* (London: Longman, Green, Longman and Roberts, 1860-1939).

prosecuted accordingly, and the persons therein assembled shall be proceeded against as Persons riotously and unlawfully assembled.

...we do hereby straitly charge and command all mayors, sheriffs, JPs, constables, Headboroughs, Commanders and others our officers and ministers... that they cause diligent search to be made from time to time, in all and every the places when any such meetings or conventicles .. shall or may be suspected. .. apprehend those assembled ..bring before JP and be bound over to appear at the next Sessions, and in the meantyme to fynd suretyes for the good behaviour, in default thereof to be committed to the next gaol.

And further we doo will and command our JPs that they cause the Oath of Allegiance to be tendered to every Person so brought before them, and upon his or their refusal, to proceed according to the Statute made in the seventh yeare of the Reign of our Royal Grandfather of ever blessed memory they are directed and commanded.

ii. Text of King's further Proclamation 17th January 1661

King's Proclamation Prohibiting the Seizings of any Persons or Searching houses without warrant except in tyme of Actuall Insurrection.⁹⁸⁹

Whereas ever since out Arrival into England, we have made it our Greate Care and Study to improve the mercies of Almighty God in our happy and miraculous Restoration, by endeavouring all that layin... to Compose and Settle the minds of all our Subjects: And in order thereunto wee did freely give our Royal Assent to th Act of General Pardon and Oblivion (which we are resolved inviolably on our part to keep and observe) yet such hath been the restles and pevers disposition of certain unreasonable men disaffected to our royal person and Government, that they have lately attempted and actually begun levying a warre and the revival... of those differences and divisions which we have so often desired and endeavoured to have buried in perpetual oblivion: And for the better effecting their malicious and

⁹⁸⁹ DLT/BII (Chester Archive).

traitorous purpose, have provided themselves with Stores of Armes and other warlike ammunition, and many of them lay privately, and do yet lurke in and about our Cities of London and Westminster, watching all opportunities to put their wicked designs in execution...

And we being given to understand, that during those late commotions, severall persons have been imprisoned by soldiers and others, their houses searched and their goods taken away without lawful authority, and that thereupon opprobrious words and termes of dissension and discrimination of parties have been said and given to our great disservice, contrary to the aforesaid Act of Oblivion...

Those are therefore strictly to charge and command all officers, soldiers and others (except upon inevitable necessity and actual Rebellion or Insurrection) to forbear to molest or trouble any of our good subjects. secure ... or seize... persons or estates... without a lawful warrant of Privy Counsel. Lord Lieutenants, DLLs or JPs ...

And we do hereby declare that as well those who shall hereafter be so hardy as to offend against this our Proclamation, shall not only not receive countenance from us therein but shall be left to be prosecuted against acc to our Laws and incur our high displeasure, as persons doing their utmost to bring scandal and contempt upon our government.

iii. Text of King's 1672 Pardon.

The General Pardon of 1672.⁹⁹⁰

This followed the Order for a list or calendar⁹⁹¹

of names, time and causes of commitment of Quakers in gaols from Sheriffs which they accordingly did, and the same were by Order of his Majestie in Councell of the third of this Instant delivered into the hands of the right Honorable the Lord Keeper of the great seale of Englande, who having considered thereor did this day returne them againe together with his opinion thereon, viz.

⁹⁹⁰ Cal 1671-1 489 SP Dom Car II 307 166.

⁹⁹¹ The list of names by County was included.

The Returnes that are made touching the position in the severall Goales are of severall Kindes.

1. All such of then as are returned to be convicted to be Transported or to be Convicted of a Priemunire (upon which Convictions I suppose Judgement was given) are not Legally to be discharged but by his Majesties pardon under the great seal.

2. All those that are returned to be in prison upon writts of Excommunication Capiendo not mentioning the Cause ought not to be discharged until the cause appears, ffor if it be for Tythes, Legacyes, Defamation or other private Interest, they ought not to be discharged till the partie be satisfied.

3. All those that are returned in prison for debt or upon Exchequer processes or of any of the other Courts at Westminster, are not to be discharged till it be knowne for what cause those processes are issued and those debts be discharged.

4. Those that are in prison for not paying their fynes ought not to be discharged without paying their fynes or a Pardon.

5. All the rest I conceive may be discharged.

And it was thereupon ordered by his Majesty in Councell That a List of the Name of the Quakers of the several prisons together with their causes of the Commitment be and is sent to his Majesty's Attorney Generall who is required and

authorised to prepare a Bill for his Majesty's Royall Signature conteyning Pardon to passe the great seale of England, for all such to whom his Majesty may legally grant the same and in Case of any difficulties that he attend the Lord Keeper and receive his Directions therein.

Edward Walker.

iv. Sir Edmund Saunders' Observations upon the definition of a conventicle under the Conventicles Act 1670.⁹⁹²

... 'tis well known that this Act never received any publick Animadversions, and yet doth need an Explanation as much as those against Recusancy, on which there have been Observations made and printed, and not without Approbation. For the reasonableness of this Publication, there need no other Apology than what Age we live....

The Act is printed in full.

A note of the Observations is as follows:

Section. I:

All statutes which have their continuance, or were by the Act of 3 Car 1 cap.4 made are enacted to have continuance until some other Act of Parliament be made touching the continuance or discontinuance of the same, by which last Act 35 Eliz is made perpetual, except 2 sections – harbouring - repealed by 3 Jac Cap 4.

This Act provides farther and more speedy remedies against seditious sectaries and disloyal persons than 23 Eliz cap 1 against saying or hearing Mass; 13 and 14 Car 2 cap. v. Quakers; 13 and 14 Car 2 cap 4 Uniformity of Publick Prayers [and] 17 Car 2 cap 2 Oxford Acts restraining non-conformists from inhabiting Corporations. [Persons includes women].

The onus of proof (*Onus probandi*) that a person is under 16 is on the Offender and appeal is available.

If convicted as an Offender when absent

from which no Appeal is given by this Act, There it may be the conviction is utterly void and the Offender may maintain an action of Trespass agst. the Officer that levies the penalty of £5s etc... And therefore, if the Offender is present, when Convicted, it will be the safest way to mention it in the Record.

⁹⁹² Sir Edmund Saunders (*Kt. late Lord Chief Justice of England. Observations upon the statute of 22 Car ii. cap. I. Entitled An Act to Prevent and Suppress Seditious Conventicles* (London 1685). Middle Temple Library, L553.

[Being a subject of the Realm relates to the time of the offence, not the time of the passing of the Act. 'Present at a Conventicle' does not apply to a lunatic, unless in a lucid interval, someone imprisoned or under threat of harm at a Conventicle etc. The specific provision in Act for fining a husband for his wife would prevent the wife claiming duress because he is going to be fined for her anyway].

Under colour or pretence of religion ...This is a question that may, and I suppose doth often happen, and I take it somewhat clear, that in such Case they may, and ought to be Convicted; For the chief end and design of the Statute was to prevent Sedition and Insurrections, and as a means to achieve this end, this Law is made to suppress Conventicles, where ... Sedition and Insurrections were contrived. Now if they should not be convicted, though there was no actual exercise of religion, then their Plotting Sedition, and contriving Insurrections being the greater Evil, should escape Correction, whilst the pretended exercise of religion being the lesser Evil, as being but in order to the greater evil of Sedition and Insurrections, should be punished, which is not, nor could be the intent of the Statute; for in my Apprehension, the Statute meant, to punish all those that should meet together under pretence of Exercise of Religion though none were actually exercised; for that is the same, or worse mischief, than if there were any Exercise of Religion.

In other manner that according to the liturgy and practice of the Church of England. This appears by the Act of Uniformity of 13 and 14 Car 2 cap 4. It may be objected that the Service Book hath appointed the Form of publick Prayers and sacraments etc but not appointed any Order to be observed in preaching. To this it is answered; by the 22nd para or section of the Act of Uniformity: That at all and every time and times, when any sermon or lecture is to be preached, the Common prayers and Services in and by the said Book (viz. the Book of Common Prayer, appointed to be read for that time of the day) shall be openly, publickly and solemnly read by some Priest ..in the Church... where the said sermon or lecture is to be preached before

such is or is to be preached, and that the Lecturer then to preach shall be present at the reading thereof. So that Preaching in a Conventicles, where the Common Prayers appointed to be read for the time of the day are not first solemnly read, is an Exercise of religion in other manner than according to the Liturgy and Practice of the Church of England.

Conventicle of 5 or more not of same household: Now here we have a complete definition of a Conventicle within this Act...

v. Quakers' suggestions for suitable JPs⁹⁹³

CHESHIRE.

This to the hands of his deare friend Gerrard Robertes at the flower deluce in Thomas Apostles these with Care deliver in London.

Friends

I Received yo' Leter as Concerninge sending up 3 Listes in Reference to the Justices which I haue dune. The first seete downe are friends who have such estates as they may Atende one that Implyment and Likwiss men Gifted for to vndertake it: Thomas Davenport: John Endon, Edward Alcocke, John Clowes, These followings are such as are moderate men and free from persecutinge speret... have estates and partes for such Implyment that are not in Comishion: Peter Venables, Robert Hide, Edward Alcock ...elder, George Etcheles, Robert Evley, John Crew, George...These following are in Comishion and have not persecuting sperits: Henrey Berkinhead, George Mandley, Gilb...rd, Thomas Tannat. These followinge are as wicked cursed persecutors as are in the nation and are in Comishion, I know worse there Cannot bee: Thomas Standley, Thomas Brereton, Edward Hide, Thomas Marbury, Thomas Manweringe, Peter Brookes. These followinge are in Comishion and haue persecuted freindes but are not soe bad as the former:- Robert Duckenfeild, Jonathan Brewen, Thomas Croxton, Henery Bradshaw. And as for Chester Citty there is not one but all of Canes Bloodey brooude. This from thy deare friend in the truth.

⁹⁹³ SPD cciii18, 21 Cal 1658-9 cited in Norman Penney (ed), *Extracts from State papers Relating to Friends 1654-1672* (Headly Brothers 1913) 358-359.

Chester 27th 3rd mo:1659. A. HUTCHINS.

WESTMORLAND.

*ffor Gerrard Robertts at the flower deluce in thomas appostles these by the
lanc. poaste bee. london 6d.*

T.M.: G. R.

*In answer to yo' of the 17th Instant which was Considered of by severall
friends in these two Counties of Westmoreland, and Cumberland with the
north parte of Lancashire they have Ordered me to returne you the names
of those hereunder written*

In the Countie of Westmorland

*Friends that are in a Capacitie to be in Comishion for the peace: John
Fallowfeild, John Morland, Edward Burowe, Henery Warde, besides two that
was put out of Comission for the peace for Conscience sake which we desire
may be in Comishion for our Countie again (viz) Gervase Benson, Anthony
Pearson.*

*Moderate men: George Archer, mayor of Kendall and in Comission for the
time being, Roger Bateman in Comishion for Kendall but never acted yet,
Gyles Readman; in Comishion for Kendall, Captain Thomas Spencer,
Moderate men all.*

*Persecutors that are in Comishion for the peace in these Counties are
Thomas Burlton, Robert Branthwaite, Thomas Braythwaite John Archer.*

Lancashire North parte

*Moderate men are these: William West, Thomas Coole, William Knipe,
William Pepper.*

*Persecutor who was late in Comishion: John Sawrey, Adam Sands and
William Rawlinson these 2: are Called at the Assizes but Acted as Justices
but are persecutors of truth.*

Cumb'land

*Friends: Anthony Pearson, Richard Fletcher, Thomas Bewly, John Tiffing,
John Robinsons.*

*Moderate men are: Lawson Ireton, Thomas Leathes, Gawen Wren: in
Comishion, Richard Bawck, Thomas Lamplugh, Thomas Sturdy.*

Persecutors are in Comishion:- Will Briscoe, John Barwis, Lanclott ffletcher, Cuthbert Studholme, Arthur Fforster, Thomas Langhorne, William Tomptson, John Hudson.

I am yo friend and fellow servant in the truth

GEO. TAYLOR.

LANCASHIRE.

These Are the names of those Called Justices who are yet in Comishion for the Hundreds As followeth In y County of Lancaster:-

Who have bene persecutors of y truth: Richard Standish, Robert Hyde, Nicholus Roystorne, John FFox, John Case, (these hath bene persecuted) Edward Gatherne, Thomas Bunch, James Bretter (moderate men in Solford hundred) Richard Mullynexe, Edward Stockley, Thomas Cubham and Nichlas Rigbee (moderate in Darbee); Meayor Robinson (moderate in Leyland); Captten Ralph Barnes, Captten Richard Cubham, John Barnes (ffrendes in Darbee).

2. Primary Source referred to in Chapter Four

i. Mayor of Chester's Papers May 1670.⁹⁹⁴

Coram John Poole Alderman and Justice Yarrow...

(NOTE: The wording of the following appears to have been taken in specific way to establish breach of the Conventicles Act: is not a spontaneous statement).

Edward Tipton and Joseph Goise(?) Soldiers in his majesty's garrison of the Castle of Chester informed upon oath that this day about twelve of the clock the persons hereafter named to witt Richard Smith Markuss ...Edward Morgan Richard Sympton Edmund Ogden Randle Croxton(?) and Richard ...together also with ...wife of Edward Morgan Jarrad Blundell ...

Being persons about the age of sixteen years and above the number of five besides the persons of the family now assembled and met together at the

⁹⁹⁴ MF/88/2, Chester Archive.

house of the said R S in this Cittie, And they ...heard some noise in the house before they entered the rooms, where the said persons were: but then when they were comme into the rooms, the said persons were silent: but those deponents doo verily believe that the said persons were assembled and met together under pretence and colour of exercising religion contrary to the liturgy of the Church of England and contrary to the laws of the land.
Signed Edward Typton Joseph G... (his mark).

The persons aforesaid being examined of the occasion of their meeting refused to answer thereto.

Upon the evidence above written committed Richard Smith and fined in contempt the rest By me John Poole.

Coram Maior of Chester and ... May 1670.

Thomas Harrison and Robert Evans ...soldiers in His Majesties garrison of the castle of Chester informed upon oath that between four of the clock this afternoon at the house of Richard Smith in St John's Lane in this cittie of Chester were met and assembled together the said RS EM Mark Jellicoe(?) EO Richard Symington Edward ... Randle Croxton Richard... Ellen Underwood Jarrad Blundell ... the wife of the said RS Sara Worthington... Wattmouth ... Morgan R.. .Gill. And these deponents doo verily believe that the said persons were soo met together under pretence of exercising religion otherwise than is allowed by the liturgie of the Church of England and contrarie to the Lawes of the land.

Thomas Harrison

Robert Evans (his mark)

The persons above named being examined What was the occasion of their meeting answered that they met to wait upon god and to worship god.

Upon the evidence above written and notorious circumstances of the fact the persons aforementioned are convicted and fined as followeth RS for voluntarily and willfull permitting the said Conventicle ... EM for being

present at the same Conventicle ... MJ likewise RS likewise ... of some fined for the first offence others for the next (?) offence.

(9 Signatories).

17th May 1670.

Letter signed by Robert Morrey, Mayor, Thomas Cowper, William Ince, William Crompton, John Poole.

We have lately come downe (?) The Act of the last Session of Parliament entitled An Act to prevent and Suppress Seditious Conventicles...Sunday last we have by virtue thereof convicted and fined them according to ... and issued warrants [against] some Quakers for levying the fines upon the offenders' goods and chattels. Who notwithstanding to ob[struct?] the execution of the warrant doo keep their doors shut and bolted or locked so that the constables cannot have admission into their houses to ... the warrant. And some of them do convey their goods forth of their houses into places .. to flout (?) the exercise of the warrant, And there being no ... in that Act that doth directly authorise the Constables to break open the outer door or any yet of the house upon these warrants as wee are... too and are doubtful whether they may legally attempt it, or not And also yet if the Quakers or others ... apprehended and that Act shall immediately after their first ... assemble and meet together again in the same place whether, that later meeting may be adjudged a second offence these things being a little dubious unto us wee humbly desire you will please peruse the Act and give your advice upon these poynts by the next ... for our more regular and justifiable proceedings

in this behalf, we being most unwilling either to countenance or connive at these meetings, and also to do anything that might bee repugnant to the law

The forthcoming advice was not contained in these papers but a further letter acknowledged it. It appears that the advice was against forcing open doors to levy fines. Consequently:

All our proceedings against them will bee ineffective and they when they understand that defect in the law will be more imboldened to continue their

meetings and prove we fear incorrigible, they having already declared, that they will perform their... And... so they may) if this Act (which was so much designed for the suppression and exploding of Conventicles) do not virtually give power to break open doors upon warrants of distress; as well as it does expressly upon warrant for apprehension. Wee desire you to consult the Lord Keeper, or whom else you think fit upon that part of the Act, and be pleased to impart their opinions therein to you. We likewise pray your solution to this question, whether that the Constables having entered in at the outer door, may not force open any minor doors in the house, where they conceive goods are ... Our desire, not to do anything inadvisable but to ... your direction first in all ambiguous cases, and yet to have the law duly executed upon obstinate offenders...

22.5.70.

Warrant to Constables of the several wards ...For as much as we are credibly informed that diverse persons are assembled at the house of Richard Smith within the parish of St Johns in the said citty of Chester under colour or pretence of exercising religion in other manner than according to the liturgy of the C of E contrary to a late Act of Parliament entitled An Act to prevent and suppress seditious conventicles ... and therefore in his Majesties name straitly to charge and command you and every one of you immediately upon receipt hereof to repair to the said house where the said Conventicle is held And to apprehend and bring before us all and every those persons therefore assembled to the end they may bee proceeded against according to the said Act of Parliament And in case you be denied entrance to the said house or other place where the said conventicles is kept then you are hereby further required and impowered by virtue of the said Act to break open and enter into the said house or other place where the said Conventicle is held within the ... And to take into your custody the persons so assembled And to bring them before us to the intent aforesaid Given under our hands....

Morrey, Poole, Cowper, Ince etc.

[Endorsed on reverse: fines.]

3. Primary Source referred to in Chapter Six

i. Thomas Rudyard's Petition against the Acts against Popish Recusants.⁹⁹⁵

That from the making of the said Statutes in the time of 2 Eliz. Until within the space of 4 or 5 Years last past: the like Prosecution of Protestant Dissenters hath not been known.

And that the said Statutes, when made, were designed against Papists, and not against Protestants, will appear by examination of the Preambles and Purport of the same.

Three statutes used to convict for 20 l. a Month and two thirds of their estates seized into the King's hands: 1) 23rd Eliz. An Act to retain the Queens Majesties subjects in their due obedience, 2) 28th of Eliz. and 3) 3rd of James.

- 1) An Act against the bringing in and putting into execution of Bulls, Writings and Instruments, and other Superstitious Things from the See of Rome, divers evil-affected Persons have prevailed (?) contrary to the meaning of the said Statutes, by other means than by Bulls and Instruments, Written or Printed, to withdraw divers the Queens Majesties subjects from their natural Obedience to obey the said usurped Authority of Rome, and in receipt of the same to persuade great numbers to withdraw their due Obedience to her Majesties Laws &c.*
- 2) For reformation whereof, and to declare the true meaning of the said Law, Be it Declared and Enacted, by the Authority of the present Parliament, That all Persons &c.*
- 3) In this Preamble we may clearly understand a double or twofold end, for which this Statute was made and provided (viz.) for Reformation and Information.*

⁹⁹⁵ Thomas Rudyard *The Case of Protestant Dissenters of late prosecuted on old statutes made against Papists and Popish Recusants The two thirds of whose Estates are Seized into the KINGs Hands, and the Profits thereof Levyed Yearly. And many other Prosecuted for 20l. a month, to the Ruine of many Families* (London 1680) Quaker Archive Box 154. 1.40).

1st. For Reformation (viz.) of such who withdrew the Queen's subjects from their natural Obedience to the usurp'd Authority of Rome, as the preceding Words are.

2dly, For Information in these Words (viz.) To declare the true meaning of the said Law (viz.) the Law of the 13th of the Queen, which the said Statute recites, which said Law was provided against bringing in and putting into execution of Bulls, Writings, Instruments and other Superstitious Things from the See of Rome.

And if we read the said Statute, it gives an account, That those Bulls were brought from Rome to absolve and reconcile such who forsook their Obedience to the Queen, to yield and subject themselves to the Popes usurp'd Authority.

So the design of the said Statute was to prohibit such Bulls on pain of High Treason, and to prohibit the bringing into the Realm, Tokens or Things called Agnus Dei, Crosses, Pictures, Beads and such like vain and superstitious Things, which being consecrated by the Pope, &c., divers Immunities and Exemptions were said to be granted. As that Statute words it.

So that this statute of the 23rd of Eliz. Appears to be a Supplementary Act, and Explanatory, of the 13 of the said Queen against the bringing in of Agnes Dei, Crosses, and c. and therein also provides against Withdrawing any of the Queens subjects to the Romish Religion (which that Age conceived to be dangerous).

So that they first make it Treason to withdraw any from the Queens Obedience or Religion (then established) to the Romish Religion, or to obey the Authority of the See of Rome, or other Prince.

They 2dly. make it Treason to be reconciled or drawn to the Romish Religion.

They 3rdly. make it Misprision of Treason to be Aiders, Maintainers or Concealers of such as perswaded [sic] others to withdraw themselves.

They 4ly. provide the Penalty of 200 Marks, and a Years Imprisonment, for such as shall Say or Sing Mass, and then Enact generally;

5ly. That all Persons above the age of 16 Years, which shall not repair to Church once a Month, shall forfeit for every Month 20l. Upon which is the present Prosecution against Protestants.

Now it is very evident by the Statute of the 13th of the Queen, and by this of the 23d. of the Queen, That

1st. The offences provided against by these Statutes were the bringing in of Bulls, Agnus Dei's, Crosses, Pictures, Beads such like vain and superstitious Things.

2ly. The Persons offending were the Imposters or Spreaders thereof, persons perswading others or themselves to the Romish Religion, or See of Rome, and Sayers and Singers of Mass. And to be Aiders or Maintainers of such.

So we conceive the execution thereof was never intended, and hope (by such Provision as the Parliament in Wisdom shall see meet) will not be extended to Protestant Dissenters, as of late years it hath been, contrary to all former Usage and Practice.

And that these Words All Persons, shall be such only, whom the Statute in express Words and Terms complains of, as only dangerous; and by such Pains and Penalties thereby intended to be reform'd.

The 2d. Statute on which such Prosecutions against Protestants are grounded is that of the 28th of the Queen; the Title bespeaks it what it is (viz.) An Act for the Speedy Execution of certain Tranches (?) made in the 23rd. Year of the Queen – which is the Act to retain the Majesties Subjects in their due Obedience. The same which is before repeated. And provides against fraudulent Conveyances which might be made to defraud the Queen of her 20l per Mensem. And orders the Conviction to be return'd into the Exchequer, and process to be made out thence to collect it, or for Non-payment, two 3ds. of their real Estate to be seized into the Queens Hands, & c.

So that until the 3d of King James (a time memorable to all Protestants, for the great Deliverance from the Gun-Powder-Plot) the former Laws continued without alteration or supplement. And in the 3d. of that King's Reign was made a Statute, Intituled, An Act for the better discovering and

repressing Popish Recusants. Which is the third Statute on which are prosecuted Protestant Dissenters, by the whole series of which Statute it will appear, that Protestants were intended to be secured, but never intended to be prosecuted by it, as they are of late days.

And I may repeat the preamble of the Statute, which will sufficiently Evidence the Intent and Design thereof.

Which runs thus (viz.)

For as much as it is found by daily experience, that many his Majesties Subjects that adhere in their Hearts to the Popish Religion, by the infection drawn from thence, and by the Wicked and Devilish Council of Jesuites, Seminaries and other like Persons, dangerous to the Church and State; are so far perverted in point of their Loyalty, and due Allegiance unto the King's Majestie, and the Crown of England, as they are ready to entertain and execute any treasonable Conspiracies and Practices, as evidently appeareth by that more Barbarous and Horrible attempt to have blown up with Gun-Powder the King, Queen, Prince, Lords and Commons, in the Parliament Assembled; tending to the utter Subversion of the whole State, lately taken by the instigation of Jesuites and Seminaries, and in advancement of their Religion, by their Scholars taught and instructed by them to that purpose: Which attempt by the only Goodness of Almighty God was discovered and defeated, And where diverse Persons Popishly-affected, do nevertheless (the better to cover and hide their false Hearts, and with more safety to attend the Opportunity to execute their mischievous Designs) repair sometimes to Church to escape the punishment of the Laws in that behalf provided.

For the better discovery therefore of such Persons and their Evil affections to the King's Majesty and the State of this His Realm; to the end, that being known, their Evil-purposes may be the better prevented. Be it Enacted by & c. that every Popish -Recusant convict, or hereafter to be convicted, &c.

In which there is no mention of other than Popish-Recusants not one Word of Protestant Dissenters, or Recusants, or other Dissenters or Recusants than Popish only. Besides, enquire into the Statute.

It provides, that Popish Recusants conformed, or afterward to conform, should once a month take the Sacrament of the Lord's Supper into their Parish Church as in...

2d. Inflicts the Penalties of 20l. 1st year, 40l. the 2d. and 60l. the 3d. year for such Popish Recusants not receiving the Sacrament, as in ..3d.

It Enacts that the Church Wardens and Constables of every Town &c., for the time being; or, if none, the chief Constable of the Hundred, & c. shall present the Names of all Popish Recusants, and the Children of the said Recusants, of 16 years old, as in... 4th.

4ly. This Statute of the 3d. of K. James, recites the afore-said Statute of 23 Eliz. By which the said Recusants(viz.) Popish, forfeit the 20l.per Mensem, as in..10.

5ly. And also recites the afore-said Statute of 28 Eliz. directing how the Q. could recover the 20l. per mensem, by seizure of two 3ds.of the real Estate of such convicted Recusants. After which recital, it is therein alledg'd, that the 20l. per mensem is a Burthen to the poor, and ease to the rich; who keep large Estates in their own hands which (as says the Statute) they do for the most part imploy (as Experience hath taught) In the maintenance of Superstition and Popish Religion, and to the relief of Jesuites, Seminaries, Priests and other dangerous Person to the State. And –

So it's clearly apparent by the delineation and explanation of Offender and Offences throughout this Statute

As 1st. Offenders (viz.) Jesuits, Seminaries, and such like persons, dangerous to Church and State, Person Popishly-affected, adhering in their Hearts to the Popish Religion – To cover and hide their false Hearts, and the better and with more safety to attend their mischievous designs, repair sometimes to Church, &c. Persons ready to execute and Treasonable Conspiracies and Practices.

2ly. Their Offences or Designs (viz.) That horrible attempt to blow up with Gun-Powder the King, Queens, Prince, Lords, Commons in Parliament. And this to advance their Religion, and to Subvert Church and State.

And so throughout the whole Statute, the Persons enjoined to take the Sacrament, to be presented by Constables, and such like, as Papists,

persons Popishly-affected, adhering to the Popish Religion and Popish Recusants.

By which all we hope it clearly appears, That those Statutes were intended against Popish Recusants only, and not against Protestant Dissenters or Recusants in general, nor any other than Popish, and hope that the Prosecution of Protestant Dissenters (as they have been of late) is and now at the present are, an extending the sense of those Statutes beyond Reason, and the intent of the Law –makers. – All which is submitted to the Judgement of the Parliament Assembled, to Consider and Redress, as they in Wisdom shall see meet.

And this following Declaration is humbly offered as a Test to distinguish between PROTESTANTS and PAPISTS.

I A. B. Do Solemnly and in good Conscience Profess, Testify and Declare that I do not believe that the Church of Rome or Papal Church is the true Church, out of which there is no Salvation; or that the Pope or Bishop of Rome is Christ's Vicar, or head of the true Catholick Church on Earth; or that either he or the See of Rome, hath any Authority Derived from Christ or his Apostles, to be head of the true Catholic Church. Or that the Pope or the See of Rome jointly or severally hath any Jurisdiction or Supremacy over the said Catholick Church in general, or myself in particular; or that the Pope hath any power to depose Princes or absolve Subjects of their Allegiance, on any account whatsoever; or that it belongeth to the Pope or Authority of the Church or See of Rome, to be sole Judge of Spiritual matters, or of the sense of Holy Scripture; or that the Pope or his Clergy hath power to Pardon Sins, past present, or to come to, or grant or give Indulgences for Sin of any kindsoever; or that their Doctrine of Purgatory, or Prayer to or for the Dead, is according to the Doctrine of the Holy Scriptures, or the Virgin Mary, or any other Saint or Angels ought to be Worshipped or prayed unto, or are Mediators between God and Man; there being no Mediator but Jesus Christ only. Or that the Elements of Bread and Wines, at or after the Priest hath pronounced his Words of Consecration, are Transubstantiated, or the whole or any part of the substance of the

Bread or Wines, is at all changed into the Flesh or Blood of Christ, or that the Sacrifice of the Mass as it is now said to be used in the Church of Rome, is other than Superstitious and Idolatrous.

And I do solemnly in the Presence of God, Profess and Declare, that I do make this Declaration, and every part thereof, in the plain and ordinary sense of the Word read unto me; As they are commonly understood by the English Protestants, without any Evasion, Equivocation, or Mental Reservation whatsoever; And without any Dispensation already granted me for this purpose by the Pope, or any other Authority, or Person whatsoever, and without any hope of any such Dispensation, from any Person or Authority whatsoever, or without thinking that I am or can be acquitted before God or Man, or Absolved of this Declaration, or any part thereof; Although the Pope, or any other Person or Persons, or Power whatsoever, should dispense with or pretend to annul the same or declare that it was null and void from the beginning.

4. Primary Sources referred to in Chapter Eight

i. Fell v Brownsword (1672) Consistory Court of York, Cause Paper CP.G.3104.⁹⁹⁶
[piece 1, page 1]

In the name of God, Amen, before you, the venerable man Thomas Burwell LLD, legally constituted Official of the Consistory Court of York, your surrogate, or before any other judge competent to preside over the business, the party of the discreet man John Fell coming before you to receive lawful judgement in the better and more official manner and form of the law, as he might and ought, [in his plea] against William Brownsword, clerk, present vicar of the parish church of Kendal (Kendall) in the archdeaconry of Richmond within the diocese of Chester and province of York, and against whoever else on his behalf, says, alleges and propounds in these writings the articles which now follow.

⁹⁹⁶ Translated from Latin by Dr. Paul Bryburgh (Archivist, Borthwick Institute).

1. Firstly, he propounds and argues that Sir William Brownsword, cleric, had cited the above-said John Fell to come before the venerable man Thomas Craddock MA, the surrogate or deputy of the venerable man Joseph Craddock LLD, knight, commissary in and throughout the archdeaconry of Richmond in the diocese of Chester aforesaid, in order to answer him in a certain cause concerning the withdrawal of tithes and of other ecclesiastical rights; and he contests the manner and form of the foregoing and the time, how and to what extent that this is probable, and jointly and severally and concerning each one of them.

2. Item, he propounds and argues that in the process of the said cause, even though the said John Fell had not been judicially, or in any other lawful manner, cited to appear by sufficient notification to answer the same William Brownsword in the said present cause, notwithstanding this the abovesaid Thomas Craddock, the beforesaid surrogate, favouring the party of the said William Brownsword more and proceeding in this business wrongly, iniquitously and unjustly (saving his reverence), at the deceitful petitions and persuasion of the party of the said William Brownsword clerk, not having properly weighed up his alleged contumacy, cited the said John to appear before him at a certain time and place now past that were completely unsuitable to answer the same William Brownsword, clerk, in the aforesaid cause. [page 2] (Whereas the facts demonstrate him not to be contumacious) he [Craddock] decided to excommunicate him [Fell], despite there being insufficient reason for this, namely that the court was not sitting and it had been undertaken without any writings by which this excommunicate could have been denounced in open view of the church, but he had instead ordered and commanded it; and he propounds as above.

3. Item, he propounds and argues that each and all of the foregoing accusations, invalidities, iniquities and injustices, as well as particularly the decree of the sentence of excommunication promulgated against the before-said John Fell thus (as aforementioned), and his denunciation and anything else brought against him in whatever manner, ought to have been and was appealed before the most reverend father in Christ, Lord

Richard, by divine providence archbishop of York, primate of England and metropolitan [Archbishop Richard Sterne, 1664-1683], in another court of the Consistory of York, and the party of the said John Fell appealed in a proper and lawful manner and nothing was impleaded against him; and he propounds as above.

4. Item, he propounds and argues that the said William Brownsword, clerk, was and is the present vicar of the parish church of Kendal (Kirby Kendall) in the archdeaconry of Richmond, diocese of Chester and province of York, and that he managed to interfere with your jurisdiction in this cause by reason of an appeal.

5. Item, he propounds and argues that each and all concerning the foregoing was and is the public voice and fame within the said parish of Kendal in the archdeaconry of Richmond, diocese of Chester and province of York, and in other neighbouring and surrounding places; and he propounds as above.

Wherefore, he having made sufficient faithful oath concerning the foregoing in as much as the law demands, the party of the said John Fell prayed on account of the voice of the appeal, which had interfered in this business at other times and had adversely affected your jurisdiction in this business, and because through the action of the judge in this business the appeal, pronouncement and process had been and is pronounced, determined and declared to have been good, that the said William Brownsword be now condemned by ecclesiastical censure and, so condemned, be compelled to pay the debt of the expenses incurred, and to be incurred lawfully, in this business on behalf of and by the party of the same John Fell [page 3], and that right and justice be shown, given and ministered to him and his party in each and all of the foregoing matters by you and by your definitive sentence to the judge before said. The party of the said John Fell propounds this and requests it be done jointly and severally, not straining themselves to prove each and all of the foregoing matters or being forced to have the extra burden of proof upon them, of which they protest, but humbly imploring you to go and obtain that which

he [Fell] has proved in the foregoing with the before said judge in his petitions with the benefit of the law, saving always your office in all things.

Saving the law, it is protested

[piece 2, page 1]

27 June 1672

Personal responses of William Brownsword, clerk, made to the positions and articles of the libel given and exhibited against him on behalf of and by the party of John Fell.

To the first position, he answers that he believes it to be true.

To the second position, he answers that he refers to the act and process before the judge to whom he had made appeal for what he had done for himself, and to the laws. Otherwise, he does not believe the same to be true in any way.

To the third position, he answers that he refers to the present appeal (which he has submitted here) and to the laws. Otherwise, he does not believe the same to be true in any way.

To the fourth position, he answers that he believes that this respondent is and was the vicar of the parish church of Kendal articulate within the archdeaconry, diocese and province articulate, and that, thus, within the jurisdiction of this court by reason of appeal (which he lawfully lodged). Otherwise, he does not believe the same to be true in any way.

To the fifth position, he answers that he believes that which he believes to be true and that which he does not believe not to be true.

ii. Counsel's Advice upon how to prevent excommunication for non-payment of Tythes.⁹⁹⁷

Instructions and Directions for such of the people called Quakers as are or have been cited into ecclesiastical courts for non –payment of tythes or not contributing towards the reparation of steeplehouses, or parsons wages etc in order to make their legal defence to prevent their being

⁹⁹⁷ Book of Cases, YM/MfS/BOC/1(Quaker Archive)175.

excommunicated for their not answering such libels as shall be exhibited against them in such courts upon oath as followeth:

- 1. When they are so cited they had best appear in court, according to the citation, either in their proper persons, or by their proctor retained for that purpose. And then ... demand copy of the libels exhibited against them, in the ...of some persons who can make affidavit of such demand if ... requires.*
- 2. In case they can obtain such copy of the libels exhibited against the, they are to repair to some able Counsel to attend him and retain him to draw their Answers to such libels And when it is so drawn, and also ingrossed, the partyes prosecuted may g with their Counsell and tender it so ingrossed into the Court ready signed by the defendants.*
- 3. If the Court shall refuse to accept of such an Answer unless the Defendants be first sworn to the truth thereof let their Counsell insist that such their answer ought to be accepted though not upon oath; for that no ecclesiastical court has power to administer an oath in any case other than in causes matrimonial or testamentary. And for that reason let the Counsel press the Court to accept thereof without compelling the defendants to swear to the truth of their answers about matters no way concerning causes matrimonial or testamentary.*
- 4. In case any person be prosecuted upon contempt to an excommunication for not delivering their answers on oath to such libels And shall happen to be apprehended and committed to prison in that respect upon writ de ex communicato capiendo or upon a warrant form a JP such persons so imprisoned may by their Counsell inform the Court of King's Bench at Westminster that they tendered their answers as aforesaid, before sentence of excommunication was pronounced against them which according to law ought to have been accepted, though not sworn unto .. and therefore to pray the Court to grant a supercedeas for their enlargement being pleased against as aforesaid contrary to Law.*

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